(24,409)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 268.

WILLIAM H. BERRY, JOHN E. HOWE, AND DAVIS C. MOTT, CONSTITUTING THE BOARD OF PAROLE OF IOWA, ET AL., APPELLANTS,

vs.

RUDOLPH DAVIS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

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a Pleas and Proceedings in a Certain Cause Lately Pending in the District Court of the United States for the Southern District of Iowa, Eastern Division, Wherein William H. Berry, John E. Howe, and David C. Mott, Constituting the Board of Parole of Iowa, et al. are Appellants and Rudolph Davis is Appellee.

Appearances.

George Cosson, Attorney General for Iowa, Des Moines, Iowa, Attorney for Appellants.
George B. Stewart, Fort Madison, Iowa, Attorney for Appellee.
WM. C. McARTHUR,
Clerk, P. O., Des Moines, Iowa.

1 In the District Court of the United States, Southern District of Iowa, Eastern Division.

No. 9-A. In Equity.

RUDOLPH DAVIS, Plaintiff,
vs.
WILLIAM H. BERRY, JOHN E. HOWE, and DAVID C. MOTT, Constituting the Board of Parole of Iowa; James C. Sanders, Warden and Managing Officer of the Penitentiary at Ft. Madison, Iowa, and Austin F. Philpott, Physician of said Penitentiary, Defendants.

Citation.

Filed September 28th, 1914. Wm. C. McArthur, Clerk.

United States of America to Rudolph Davis, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, D. C., pursuant to an appeal allowed and filed in the clerk's office of the District Court of the United States for the Southern District of Iowa, Eastern Division, wherein Wm. H. Berry and others, constituting the Board of Parole of Iowa, and James C. Sanders, Warden, and Austin F. Philpott, physician, are appellants, and you are appellee, to show cause, if any there be, why judgment or decree rendered against the said appellants, as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Smith McPherson, Judge of the District Court of the United States Southern District of Iowa this 11th day of September A. D. 1914.

SMITH McPHERSON,
Judge of said Court.

2 Due and legal service of the foregoing citation together with the receipt of a copy thereof is hereby acknowledge this 26 day of Sept. A. D. 1914.

GEORGE B. STEWART,
Attorney for Rudolph Davis, Appellee.

2½ Be it remembered that on the 11th day of March A. D. 1913 there was filed in said court a Bill in Equity in the case of Rudolph Davis, Complainant vs. William H. Berry, John E. Howe and David C. Mott, constituting the Board of Parole of Iowa; James C. Sanders, warden and managing officer of the penitentiary at Ft. Madison, Iowa, and Austin F. Philpott, Physician of said penitentiary, Defendants; which said Bill in Equity is in words and figures following to-wit:

3 In the District Court of the United States for the Southern District of Iowa, Eastern Division, at Keokuk, April Term, A. D. 1914.

In Equity. No. 9-A.

RUDOLPH DAVIS, Plaintiff,
vs.
WILLIAM H. BERRY, JOHN E. HOWE, and DAVID C. MOTT, Constituting the Board of Parole of Iowa; James C. Sanders, Warden and Managing Officer of the Penitentiary at Fort Madison, Iowa, and Austin F. Philpott, Physician of said Penitentiary, Defendants.

To the Honorable Judge of the United States District Court for the Southern District of Iowa:

Rudolph Davis, the plaintiff, complains and says:

1st. That the plaintiff is a citizen and resident of the State of Louisiana, temporarily confined in the Iowa State Penitentiary, at Fort Madison, in the County of Lee and State of Iowa, and within the Southern Judicial District of Iowa.

2nd. That the defendant William H. Berry is a citizen of the State of Iowa, and a resident of Indianola, Warren County, in the State of Iowa, within the Southern Judicial District of Iowa; the defendant John E. Howe is a citizen of the State of Iowa, and a resident of Adair County, in the State of Iowa, within the Southern Judicial District of Iowa; the defendant David C. Mott is a citizen of the State of Iowa, and a resident of Iowa County, in the State of Iowa, within the Northern Judicial District of Iowa; the defendant James C. Sanders is a citizen of the State of Iowa, and a resident of the county of Lee, in the State of Iowa, within the Eastern Division of the Southern Judicial District of the State of
4 Iowa; and the defendant Austin F. Philpott is a citizen of the State of Iowa, and a resident of the County of Lee, in the State of Iowa, within the Eastern Division of the Southern Judicial District of Iowa.

3rd. That the plaintiff is a convict, No. 10406, in the said penitentiary, under a judgment of the District Court in and for Linn County, Iowa, made and entered on the 27th day of August, 1913, sentencing him to not exceeding ten years, for the crime of breaking and entering.

4th. That the defendant- William H. Berry, John E. Howe and David C. Mott are members of, compose and constitute the Board of Parole of the State of Iowa; that the defendant James C. Sanders is the warden and managing officer of the Iowa State Penitentiary at Fort Madison, Lee County, Iowa; and the defendant Austin F. Philpott is the physician of said penitentiary, which is a public institution of the State of Iowa.

5th. That acting under Chapter 187 of the Acts of the Thirty-fifth General Assembly of the State of Iowa, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof, the defendants, acting as the board of said penitentiary, organized under said Chapter 187, did, on the 14th day of February, 1914, decide by an unanimous vote that the operation of vasectomy should be performed on this plaintiff; that the minutes of said board in the plaintiff's case read as follows:

"The case of Rudolph Davis No. 10406 was presented and on examination it was found that Rudolph Davis has been twice convicted of a felony, the last conviction being for a crime committed since the 4th day of July, 1913. He is now serving under the sentence on last conviction, and is a prisoner in the penitentiary at Fort Madison. It was moved that the operation of vasectomy be performed on Rudolph Davis No. 10406 and said motion prevailed unanimously."

6th. That on the 5th day of March, 1914, the said Board, through its chairman, the defendant William H. Berry, issued its mandate to the defendant James C. Sanders, as managing officer of said penitentiary, ordering that the operation of vasectomy be performed on this plaintiff, and directing the defendant Austin F. Philpott, as physician of said penitentiary, to forthwith perform said operation on this plaintiff, or have same performed by some one selected by him. A copy of said mandate is hereto attached, marked Exhibit "B," and made a part hereof.

7th. That the defendant Austin F. Philpott threatens to immediately designate some person to forthwith perform said operation on this plaintiff, and will do so unless restrained by this Honorable Court.

8th. That the operation of vasectomy consists in the resection or incision of the vas deferens, and would sterilize this plaintiff and render him incapable of procreation.

9th. That said Chapter 187 of the Acts of the Thirty Fifth General Assembly of the State of Iowa violates and is contrary to Section 10, Article I, of the Constitution of the United States and is, therefore, void and of no effect; that as applied to this plaintiff it is ex post facto in that it was approved April 19, A. D. 1913, and became effective July 4, 1913; that he has not been twice convicted of a felony since July 4, 1913, and never has been twice convicted of a felony in the State of Iowa.

10th. That said Chapter 187 of the Acts of the Thirty Fifth General Assembly of the State of Iowa violates and is contrary to Article I, Section 21 of the Constitution of Iowa, and is therefore void and of no effect in that as applied to this plaintiff it is ex post facto for the reasons set forth in the 9th paragraph of this bill.

11th. That said Chapter 187 of the Acts of the Thirty Fifth General Assembly of the State of Iowa is contrary to Section 10 of Article I of the Constitution of the United States, which forbids any state to pass a bill of attainder in that it is a legislative act inflicting punishment without a judicial trial; that the said Act creates a new offense under the laws of Iowa, prescribes a punishment therefor, sentences the plaintiff and all other convicts who have been twice convicted of a felony, and orders the execution of the sentence without indictment, information or trial, and without giving the convict an opportunity to defend himself without requiring legal evidence, and without giving the convict the benefit of counsel.

12th. That said Chapter 187 of the Acts of the Thirty Fifth General Assembly of the State of Iowa is contrary to Article I, Section 21 of the Constitution of Iowa for the reasons set forth in paragraph 11 of this bill.

13th. That said Chapter 187 of the Acts of the Thirty-Fifth General Assembly of Iowa is contrary to Section I, Article I of the Constitution of Iowa, for the reason that it deprives the plaintiff of his inalienable right to enjoy life and liberty and to pursue and obtain safety and happiness.

14th. That said Act of the General Assembly of Iowa is contrary to Section 9 of Article I of the Constitution of Iowa, which provides that the right to a trial by jury shall remain inviolate, in that the said Act prescribes the punishment of vasectomy for a convict twice convicted of a felony without requiring the fact of such convictions to be determined by a jury but leaves the determination of that question to the board of parole, the managing officer of the prison, and the prison physician, and plaintiff further avers that the indictment against him in Linn County, Iowa, under which he was convicted, and sentenced to the said penitentiary, and under which judgment he is now confined did not refer to the alleged former conviction of the plaintiff; that no evidence of a former conviction was introduced and the jury did not specially find that this plaintiff had been formerly convicted.

15th. That said Act of the General Assembly of Iowa is contrary to the 14th Amendment to the Constitution of the United States, which provides "that no state shall deny to any person within its jurisdiction the equal protection of the laws," in that it applies only to persons who have been twice convicted of felonies and are inmates of the penitentiary, while it does not apply to persons who have been twice convicted of felonies but are not inmates of the penitentiary.

16th. That said Act of the General Assembly of the State of Iowa is contrary to the 14th Amendment of the Constitution of the United

States for the reason that it abridges the privileges and immunities of this plaintiff as a citizen of the United States and deprives him of his liberty without due process of law.

17th. That said Act of the General Assembly of Iowa is contrary to Section 9, Article I of the Constitution of Iowa for the reason that it deprives the plaintiff of liberty without due process of law.

18th. That said Chapter 187 of the Acts of the Thirty-Fifth General Assembly of Iowa is contrary to Section 17, Article I, of the Constitution of Iowa, which provides that cruel and unusual punishment shall not be inflicted, for the reason that the operation of vasectomy is a cruel and unusual punishment.

19th. That plaintiff is without adequate remedy at law; that plaintiff will suffer irreparable loss and damage unless a temporary restraining order is granted without notice restraining the defendants, or any of them, and any one acting under their authority or designation, from performing said operation of vasectomy upon him.

20th. That the amount in controversy in this action exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars.

21st. That plaintiff is without means and is unable to give an injunction bond.

Wherefore, to the end that he may obtain the relief to which he is justly entitled in the premises, the plaintiff prays the court:

8 First. To grant to him your writ of subpœna, directed to William H. Berry, John E. Howe and David C. Mott, constituting the Board of Parole of Iowa; James C. Sanders, Warden and Managing officer of the penitentiary at Fort Madison, Iowa, and Austin F. Philpott, Physician of said penitentiary, requiring and commanding all of them, and each of them, to appear and answer this bill of plaintiff at the next April Term, 1914 of said court, in and for the Eastern Division at Keokuk, but not under oath, answer under oath being expressly waived.

Second. To grant an interlocutory writ of injunction commanding the said defendants, and each of them, their servants, agents, employes, and all persons under their authority, direction or control, to absolutely desist and refrain from performing the operation of vasectomy upon this plaintiff, and commanding the said defendant, Austin F. Philpott, to refrain from designating any other person to perform said operation on this plaintiff, and that upon the final hearing and determination of this suit that said injunction be made perpetual, and that plaintiff may have such other and further relief, preliminary and final, as to the court may seem meet and proper, and which equity may require, and for costs.

Third. That the Court grant unto your plaintiff a temporary restraining order, without notice, restraining the said defendants, and each of them, their servants, employes and agents and all persons under their authority, direction or control, from performing, or causing the operation of vasectomy to be performed on this plaintiff, and restraining the said defendant Austin F. Philpott as physician of said penitentiary, from designating any other person to perform said

operation upon this plaintiff until such time as your Honor shall direct and appoint a hearing herein.

(Sgd.) GEORGE B. STEWART,
Solicitor and Counsel for Plaintiff.

9 STATE OF IOWA,
Lee County, ss:

I, Rudolph Davis, on my oath depose and say that I am the plaintiff in the above entitled suit; that I have heard the foregoing bill in equity read over and that the facts and allegations therein stated are true as I verily believe.

(Sgd.) RUDOLPH DAVIS.

Subscribed and sworn to before me by the said Rudolph Davis this 10th day of March A. D. 1914.

(Sgd.) JESSE SCHLARBAUM,
[SEAL.] *Notary Public in and for Lee County, Iowa.*

(Endorsed:) Filed March 11, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

10 EXHIBIT "A."

Chapter 187.

Prevention of the Procreation of Habitual Criminals, Idiots, Feeble-Minded, Insane, and Diseased and Degenerate Persons.

H. F. 641.

An act to repeal the law as it appears in chapter one hundred twenty-nine (129) of the Acts of the Thirty-fourth General Assembly, and to enact a substitute therefor relating to the prevention of the procreation of criminals, rapists, idiots, feeble-minded, imbeciles, lunatics, drunkards, drug fiends, epileptics, syphilitics, moral and sexual perverts, and diseased and degenerate persons.

Be it enacted by the General Assembly of the State of Iowa:

Section 1. Unsexing of criminals, idiots, etc.—board of parole—duties.—That it shall be the duty of the state board of parole, with the managing officer and the physician of each public institution in the state, entrusted with the care and custody of criminals, rapists, idiots, feeble-minded, imbeciles, lunatics, drunkards, drug fiends, epileptics, syphilitics, moral and sexual perverts, and diseased and degenerate persons; and they are hereby authorized and directed to, annually or oftener, examine into the mental and physical condition, the records and family history of the inmates of such institution, with a view of determining whether it is improper or inadvisable to allow any of such inmates to procreate and to judge of such matters.

If a majority of them decide that procreation by any of such inmates would produce children with a tendency to disease, deformity, crime, insanity, feeblemindedness, idiocy, imbecility, epilepsy or alcoholism, or if the physical or mental condition of such inmate will probably be materially improved thereby, or if such inmate is an epileptic or syphilitic, or gives evidence, while an inmate of such institution, that he or she is a moral or sexual pervert, then the physician of the institution, or one selected by him, shall perform the operation of vasectomy or ligation of the Fallopian tubes, as the case may be, upon such person. Provided that such operation shall be performed upon every convict or inmate of such institution who has been convicted of prostitution or violation of the law as laid down in chapter two hundred sixteen (216) of the acts of the thirty-third general assembly, or who has been twice convicted of other sexual offenses, including soliciting, as defined in section four thousand nine hundred seventy-five-c (4975-C) of the supplement to the code, 1907, or who has been twice convicted of a felony, and each such convict or inmate shall be subjected to this same operation of vasectomy or ligation of the Fallopian tubes, as the case may be, by the physician of the institution, or one selected by him.

Sec. 2. Certain persons—operation upon application.—Those afflicted with syphilis or epilepsy may apply to the board of parole, or any judge of the district court, and upon order of such board or judge, the operation of vasectomy or ligation of the Fallopian tubes may be performed upon such person, any any law restricting the marriage of such persons shall be void and of none effect, in case one of the contracting parties has submitted to such operation and the same was known to both parties before their marriage.

Sec. 3. Annual report.—The board of parole shall make an annual report to the governor of the state, fully covering their proceedings under the authority of this act, and also observations and statistics regarding its benefits.

11 Sec. 4. Unsexing prohibited except as authorized—penalty.—Except as authorized in this act, every person who shall perform, encourage, assist in or otherwise promote the performance of either of the operations described in section one (1) of this act, for the purpose of destroying the power to procreate the human species, or any person who shall knowingly permit either of such operations to be performed upon such persons, unless the same shall be a medical necessity, shall be fined not more than one thousand dollars ($1,000.00), or imprisoned in the penitentiary not to exceed one year, or both.

Approved April 19, A. D. 1913.

(Endorsed:) Filed March 11, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

12 EXHIBIT "B."

To Managing Officer of the Penitentiary at Fort Madison:

At a meeting of the Board authorized by Chapter 187 of the Acts of the Thirty-Fifth General Assembly of the State of Iowa, held at the said penitentiary in Fort Madison, Iowa, on the 14th day of February, 1914, said Board examined into the mental and physical condition, the records and family history of Rudolph Davis No. 10406, an inmate of said penitentiary, and found said Rudolph Davis, No. 10406, to be an inmate of the penitentiary; that he has been twice convicted of a felony, the last conviction being for a crime committed since the 4th day of July, 1913. He is now serving under sentence on the last conviction, and that the operation of vasectomy should be performed on said Rudolph Davis, because he has been twice convicted of a felony.

It is therefore ordered that the operation of vasectomy be performed on said Rudolph Davis, No. 10406, an inmate of said penitentiary, and that A. F. Philpott, physician of said penitentiary, be and is authorized and directed to forthwith perform said operation of vasectomy, or have same performed by some one selected by him, and make return hereon to the Iowa Board of Parole.

All done under authority given in Chapter 187 of the Acts of the Thirty-Fifth General Assembly of the State of Iowa, and in pursuance of the findings and order of the local board of said penitentiary as above recited.

In testimony whereof the undersigned Chairman of the Board of the penitentiary organized and acting in pursuance of the provisions of Chapter 187 of the Acts of the Thirty-Fifth General Assembly of the State of Iowa, hereto attaches his signature.

Signed this 5th day of March, 1914.

W. W. BERRY, *Chairman.*

(Endorsed:) Filed March 11, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

13 And thereafter to-wit: On the 11th day of March A. D. 1914 there was filed in said cause a præcipe for appearance of plaintiff's attorney which is in words and figures following to-wit:

In United States District Court, Southern District of Iowa, Eastern Division.

No. 9-A. Equity.

RUDOLPH DAVIS, Plaintiff,
vs.
WM. H. BERRY, JOHN E. HOWE, and DAVID C. MOTT, et al., Defendants.

Præcipe for Appearance.

The Clerk of said Court will please enter my appearance for the plaintiff in the above cause and docket the same on the Equity Docket.

GEORGE B. STEWART.

(Endorsed:) Filed March 11th, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

14 And thereafter to-wit: On the same day March 11th 1914 there was filed in said cause an order for a temporary injunction which is in words and figures following to-wit:

In the District Court of the United States in and for the Southern District of Iowa, Eastern Division, at Keokuk.

No. 9–A. Equity.

RUDOLPH DAVIS, Plaintiff,
vs.
WILLIAM H. BERRY, JOHN E. HOWE, and DAVID C. MOTT, Constituting the Board of Parole of Iowa; James C. Sanders, Warden and Managing Officer of the Penitentiary at Fort Madison, Iowa, and Austin F. Philpott, Physician of said Penitentiary.

Temporary Restraining Order.

Whereas, in the above named suit it has been made to appear upon the verified bill of the plaintiff, filed herein that a temporary restraining order preliminary to the hearing for an interlocutory injunction is proper, and that prima facie the plaintiff is entitled thereto.

Now, on motion of said plaintiff, it is ordered that the defendants appear before the District Court of the United States, for the Southern District of Iowa, in the Eighth Circuit, at the court room of said Court at Council Bluffs, upon the 21st day of March, 1914, at 9 o'clock A. M. of said day, and then and there show cause, if any they have, why the interlocutory writ of injunction therein prayed

for should not issue, and it appearing to the undersigned that there is danger of irreparable injury being caused to the plaintiff before the hearing of said application for the preliminary interlocutory writ of injunction can be heard unless the said defendants are, pending such hearing, restrained as hereinafter set forth. And it appearing that if notice of this hearing should be given that the threatened danger complained of would occur, and that it is necessary and proper that this order be made without notice. Therefore plaintiff's application for such temporary restraining order is granted without bond.

15 Now, therefore, it is ordered that you, the said William H. Berry, John E. Howe, and David C. Mott, constituting the Board of Parole of Iowa; James C. Sanders, Warden and Managing Officer of the penitentiary at Fort Madison, Iowa, and Austin F. Philpott, Physician of said penitentiary, defendants herein, your agents, servants and employes, and all persons acting by or under your authority or direction be, and you are hereby specially restrained and enjoined from performing, or causing the operation of vasectomy to be performed upon the plaintiff, and the said defendant, Austin F. Philpott, as Physician of the penitentiary at Fort Madison, Iowa, is especially restrained from designating any other person to perform said operation upon the plaintiff until the further order of this Court.

It is further ordered that a copy of this order, certified under the hand of the Clerk and the seal of this Court, be served on each of the defendants by registered mail.

Dated at Council Bluffs, in the Southern District of Iowa, this 11th day of March, 1914.

(Sgd.) SMITH McPHERSON,
District Judge in and for the Southern District of Iowa.

(Indorsed:) Filed March 11th, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

16 And thereafter to-wit: on the 13th day of March, A. D. 1914, there was filed in said cause a waiver of service of the temporary restraining order and summons which is in words and figures as follows, to-wit:

In the District Court of the United States in and for the Southern District of Iowa, Eastern Division.

No. 9–A.

RUDOLPH DAVIS, Plaintiff,
against
WILLIAM H. BERRY, JOHN E. HOWE, and DAVID C. MOTT, Constituting the Board of Parole of Iowa; James C. Sanders, Warden and Managing Officer of the Penitentiary at Fort Madison, Iowa, and Austin F. Philpott, Physician of said Penitentiary, Defendants.

Agreement.

Hon. George Clarke, governor of Iowa, and Hon. George Cosson, attorney general of Iowa, hereby enter their appearance in the case above entitled, and each himself waives service of the restraining order herein and the notice for summons in said action.

Done at Des Moines, Iowa, this March 12, 1914.

G. W. CLARKE,
Governor of Iowa,
By EMORY H. ENGLISH, *Sec't'y,*
GEORGE COSSON,
Attorney General of Iowa.

(Endorsed:) Filed March 13th, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

17 And thereafter to-wit: On the 16th day of March, A. D. 1914, there was filed in said cause a stipulation which is in words and figures as follows to-wit:

In the District Court of the United States for the Southern District of Iowa, Eastern Division, at Keokuk, April Term, A. D. 1914.

RUDOLPH DAVIS, Plaintiff,
vs.
WILLIAM H. BERRY, JOHN E. HOWE, and DAVID C. MOTT, Constituting the Board of Parole of Iowa; James C. Sanders, Warden and Managing Officer of the Penitentiary at Fort Madison, Iowa, and Austin F. Philpott, Physician of said Penitentiary, Defendants.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the hearing on the application for an interlocutory injunction in the above entitled case shall be at Keokuk, Iowa, on the

14th day of April, 1914, at 10 o'clock A. M. and that the temporary restraining order remain in force until that time.

(Sgd.) GEORGE B. STEWART,
Solicitor for Plaintiff.
GEORGE COSSON,
Attorney General of Iowa, Solicitor for Defendants.

(Endorsed:) Filed March 16th, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

18 And thereafter to-wit: On the 16th day of March, A. D. 1914, there was filed in said cause an order designating additional judges which is in words and figures as follows, to-wit:

In the District Court of the United States in and for the Southern District of Iowa, Eastern Division.

No. 9–A. Eq.

RUDOLPH DAVIS, Plaintiff,
against
WILLIAM H. BERRY, JOHN E. HOWE, and DAVID C. MOTT, Constituting the Board of Parole of Iowa; James C. Sanders, Warden and Managing Officer of the Penitentiary at Fort Madison, Iowa, and Austin F. Philpott, Physician of said Penitentiary, Defendants.

Order Designating Judges.

This case is set down for hearing on an application for temporary injunction at Keokuk, Iowa, on April 14, 1914, at nine o'clock in the forenoon.

And it being a case coming within the United States statute requiring that two other judges be designated to assist me in the hearing of said application.

It is hereby ordered that Hon. Walter I. Smith, United States circuit judge, and Hon. John C. Pollock, United States district judge for the district of Kansas, be and they are hereby designated to sit with me and assist in the hearing and determination of said application for temporary injunction. The restraining order will remain in force until further orders.

Done and ordered of record this March 16, 1914.

SMITH McPHERSON, *Judge.*

(Endorsed:) Filed March 16th, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

19 And thereafter to-wit: On the 21st day of March, A. D. 1914, there was filed in said cause a motion for an interlocutory injunction which is in words and figures as follows to-wit:

In the District Court of the United States in and for the Southern District of Iowa, Eastern Division, at Keokuk.

No. 9–A. Equity.

RUDOLPH DAVIS, Plaintiff,
vs.
WILLIAM H. BERRY, JOHN E. HOWE, and DAVID C. MOTT, Constituting the Board of Parole of Iowa; James C. Sanders, Warden and Managing Officer of the Penitentiary at Fort Madison, Iowa, and Austin F. Philpott, Physician of said Penitentiary, Defendants.

Motion.

And now comes the plaintiff, by George B. Stewart, his solicitor, and moves the Court upon the face of the bill in the above case, which said bill is duly sworn to, to grant the interlocutory writ of injunction against the defendants in above case as in his said bill of complaint prayed.

(Sgd.) GEORGE B. STEWART,
Solicitor for Plaintiff.

(Endorsed:) Filed March 21, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

20 And thereafter to-wit: On the 14th day of April A. D. 1914 there was filed in said cause an order of continuance which is in words and figures as follows to-wit:

In the District Court of the United States in and for the Southern District of Iowa, Eastern Division.

No. 9-A. Equity.

RUDOLPH DAVIS, Complainant,
against
WILLIAM H. BERRY et al., Respondents.

Order.

It is hereby ordered that this cause be continued until Friday April 17, 1914, at nine o'clock a. m.

Done at Keokuk, Iowa, this 14th day of April, 1914.

(Sgd.) SMITH McPHERSON, *Judge.*

(Endorsed:) Filed April 14, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

21 And thereafter to-wit: On the 14th day of April A. D. 1914 there was filed in said cause an amendment to the Bill of Complaint which is in words and figures as follows to-wit:

In the District Court of the United States for the Southern District of Iowa, Eastern Division, at Keokuk, April Term, A. D. 1914.

RUDOLPH DAVIS, Plaintiff,

vs.

WILLIAM H. BERRY, JOHN E. HOWE, and DAVID C. MOTT, Constituting the Board of Parole of Iowa; James C. Sanders, Warden and Managing Officer of the Penitentiary at Fort Madison, Iowa, and Austin F. Philpott, Physician of said Penitentiary, Defendants.

Amendment to Bill.

Now comes the plaintiff and amends his bill heretofore filed in the manner following:

1. He withdraws paragraph 14 of said bill and inserts in lieu thereof the following: That said act of the General Assembly of Iowa is contrary to Section 9 of Article I of the Constitution of Iowa, which provides that the right to a trial by jury shall remain inviolate in that the said act prescribes the punishment of vasectomy for a convict twice convicted of a felony without requiring the fact of such conviction to be determined by a jury, or even by the Board created by said act, but arbitrarily and peremptorily orders said operation to be performed on convicts twice convicted of a felony, and plaintiff further avers that the information against him in Linn County, Iowa, under which he was convicted and sentenced to said penitentiary, and under which judgment he is now confined, did not refer to the alleged former conviction of the plaintiff; that no evidence of a former conviction was introduced and that the jury did not specially find that this plaintiff had been formerly convicted; that an examplified copy of said information is hereto
22 attached, marked Exhibit "C" and made a part hereof.

2. Plaintiff avers that he has been twice convicted of a felony; once in Linn County, Iowa, and once in Pulaski County, in the state of Arkansas, in the year 1909.

(Sgd.) GEORGE B. STEWART,
Solicitor and Counsel for Plaintiff.

UNITED STATES OF AMERICA,
Southern District of Iowa:

STATE OF IOWA,
Lee County, ss:

I, Rudolph Davis, on my oath depose and say that I am the plaintiff in the above entitled suit; that I have heard the foregoing

amendment to the bill in equity in said suit read over, and that the facts and allegations therein stated are true as I verily believe.

(Sgd.) RUDOLPH DAVIS.

Subscribed and sworn to before me by the said Rudolph Davis this 9th day of April A. D. 1914.

[SEAL.] (Sgd.) JESSE SCHLARBAUM,
Notary Public in and for Lee County, Iowa.

(Endorsed:) Filed April 14th, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

23 *Judge's and Clerk's Certificate.*

In the District Court of Iowa in and for Linn County.

STATE OF IOWA,
Linn County, ss:

I, Milo P. Smith one of the judges of the Eighteenth Judicial District of Iowa, within which is included Linn County, do hereby certify that Wm. Dennis whose genuine signature is attached to the foregoing and attached certificate was at the date thereof, to-wit: March 12, 1914 the Clerk of the District Court in and for Linn County, duly elected, qualified and acting, and the person having by law the custody of the Seal of said Court, and that said certificate is in due form.

Witness my hand hereto this 12th day of March A. D. 1914.

(Sgd.) MILO P. SMITH,
Judge Eighteenth Judicial District.

STATE OF IOWA,
Linn County, ss:

I, Wm. Dennis, Clerk of the District Court within and for Linn County, do hereby certify that Hon. Milo P. Smith whose genuine signature is affixed to the foregoing certificate, was at the date thereof, to-wit: March 12 A. D. 1914 one of the Judges of the District Court of said Judicial District duly elected, qualified and acting.

Witness my hand and the Seal of the Court hereto affixed at my office in Marion, in said County, this 12th day of March 1914.

[SEAL.] (Sgd.) WM. DENNIS,
Clerk of said Court.

24 In the District Court of Iowa in and for Linn County.

THE STATE OF IOWA
against
RUDOLPH DAVIS.

Information.

Comes now G. P. Linville as County Attorney of Linn County, State of Iowa, and in the name and by authority of the State of Iowa, accuses Rudolph Davis of the crime of Breaking and Entering Committed as follows:

The said Rudolph Davis on or about the 13th day of August A. D. 1913, in the county of Linn, and State of Iowa, in the night time of said day, to-wit, about the hour of nine o'clock in the night of said day, feloniously and burglariously did break and enter the building of one D. D. Dempsey there situate, in which building goods, merchandise and valuable things were then and there kept for use, sale and deposit, with intent then and there the personal goods, chattels, money and property of the said D. D. Dempsey in said building then and there being, then and there unlawfully, feloniously and burglariously to steal, take and carry away; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Iowa.

G. P. LINVILLE,
County Attorney.

STATE OF IOWA,
Linn County, ss:

I, G. P. Linville being first duly sworn do depose and say, that I have made full and careful investigation of the facts upon
25 which the above charge is based, and that the allegations contained in the above and foregoing information are true, as I verily believe.

G. P. LINVILLE.

Subscribed and sworn to by G. P. Linville before me, the undersigned this 26th day of August A. D. 1913.

[SEAL.] MARGARET D. HOGAN,
Notary Public.

26 STATE OF IOWA
VS.
RUDOLPH DAVIS.

John Cook will testify as follows:

Residence, Cedar Rapids, Iowa, Occupation, officer on the Cedar Rapids Police Force.

The- on the evening of August 16, 1913, in company with officer S. Wilson, we went to a rooming house on North 5th St. and ar-

rested Rudolph Davis on the charge of breaking and entering into the Cedar Rapids Steam Dye Works, 422 2d Avenue, belonging to one D. D. Dempsey. That we took said Davis to the Police Station, at which time he stated to me that he removed the screen from the rear window of said building belonging to the said Dempsey, broke the window pane and entered said building, at the hour of about 8:30 in the evening of August 13, 1913. That he took from said building, one ladie's skirt and waist, one gray pair of men trousers, one blue serge coat, one pair of spectacles, one money bag, one bunch of keys, and about 40 cents in cash. At the time of the arrest, he was wearing the pair of gray trousers, which he admitted having taken from said building. He stated he had given the skirt to some girl, but did not give her name; that he sold the coat to a second hand store.

S. Wilson, will testify as follows:

Residence, Cedar Rapids, Iowa. Occupation, officer on the Cedar Rapids Police Force.

I, in company with officer John Cook, arrested one Rudolph Davis on the charge of breaking and entering the store building of one D. D. Dempsey. We arrested him at a rooming house on North 5th St. in Cedar Rapids, Iowa, on the 16th day of August, 1913. That said Davis was taken to the Police Station and placed in jail. I later heard the statement made by Davis to others, as he was talking about the crime with which he was charged, which was, "I done it, and can take my little two years again."

D. D. Dempsey will testify as follows:

Residence, Cedar Rapids, Iowa, Occupation, proprietor of the Cedar Rapids Steam Dye Works of Cedar Rapids, Rapids, Twp. Linn County, Iowa. About 9:45 in the evening of the 13th of August, 1913, I discovered that my store building at No. 422 Second Ave. in Cedar Rapids, Iowa, had been entered by some one by removing the screen of the rear window, and breaking the window pane, and entering there through. On examination, I found missing Ladie's skirt and waist, gray pair of trousers, blue serge coat, one pair of spectacles, one money bag, one bunch of keys and 40 cents in cash. The spectacles, money bag, keys and cash belong to me personally, and the articles of clothing had been left by others to be cleaned.

(Endorsed:) No. —. In the District Court of Linn County, Iowa. The State of Iowa vs. Rudolph Davis. Minutes of Testimony in the above case. In vacation 1913. G. P. Linville, County Attorney.

27 #4098.

STATE OF IOWA,
Linn County, ss:

I, Wm. Dennis, Clerk of the District Court of Iowa, in and for Linn County, which Court is a Court of Record and having a seal and exercising Common Law, Equity, Criminal and Probate Jurisdiction, hereby certify that I am custodian of the seal of said Court, custodian of the files and records filed and kept therein, and I further certify that the foregoing is a true copy of the Information, together with the Minutes of Testimony in the case of the State of Iowa vs. Rudolph Davis, as fully as the same remains of record or on file in my office.

Witness my hand and the seal of said Court hereto affixed at my office in Marion in said County and State, on this 12th day of March 1914.

[SEAL.] (Sgd.) WM. DENNIS,
Clerk of said Court.

28 On this 27th day of August A. D. 1913, being satisfied from the showing made herein that this cause should be prosecuted by information the same is approved.

MILO P. SMITH,
Judge of the District Court.

This information duly filed in the District Court this 27th day of August A. D. 1913.

WM. DENNIS,
Clerk of the District Court of Linn County,
State of Iowa,
By P. O. CLARK,
Deputy Clerk.

Bail is hereby fixed on the within information in the sum of $1,000.00.

WM. DENNIS,
Clerk of the District Court, Linn County, Iowa,
By P. O. CLARK,
Deputy Clerk.

29 And thereafter to-wit: On the 17th day of April A. D. 1914 there was filed in said cause a Motion to Dismiss which is in words and figures as follows to-wit:

In the District Court of the United States in and for the Southern District of Iowa, Eastern Division, at Keokuk, April Term, A. D. 1914.

RUDOLPH DAVIS, Plaintiff,

vs.

WILLIAM H. BERRY, JOHN E. HOWE, and DAVID C. MOTT, Constituting the Board of Parole of Iowa; James C. Sanders, Warden and Managing Officer of the Penitentiary at Fort Madison, Iowa, and Austin F. Philpott, Physician of said Penitentiary, Defendants.

Motion to Dismiss.

The defendants in the above entitled cause move the court to dismiss complainant's bill, together with amendments thereto, for the reason that no federal question is involved as will appear from the facts hereinafter set forth.

On the 17th day of July, 1913, W. H. Berry, chairman of the Board of Parole, did, on behalf of the board and the commission named in chapter 187, acts of the thirty-fifth general assembly, direct a written communication to the attorney general of the state of Iowa requesting an interpretation of said chapter 187, acts of the thirty-fifth general assembly, and specifically requesting an official opinion of the attorney general as to whether or not "prisoners confined in the prisons * * * whose crimes were committed before the taking effect of the act referred to come under the provisions thereof."

In response to this inquiry the attorney general of the state of Iowa did on the 21st day of October, 1913, give an official opinion to the said W. H. Berry, chairman of the Board of Parole, in which it was held that "The act (chapter 187, acts of the thirty-fifth general assembly) should be construed to apply only to those persons who have been convicted of crime subsequent to the taking effect of said act." A copy of said opinion is hereto attached, marked Exhibit "A" and made a part hereof.

Thereafter and during the month of March 1914, said Board of Parole requested an official opinion of the attorney general as to whether or not chapter 187, acts of the thirty-fifth general assembly, should be construed as applying to persons confined in the penal institutions of this state who have not been twice convicted of a felony subsequent to the taking effect of said chapter 187, acts of the thirty-fifth general assembly.

On the 1st day of April 1914, an official opinion was given by the attorney general of the state of Iowa in which it was held that "The act should be so construed as to require that both of the felonies must be subsequent to the passage of the act" and that "this being true, and there now being no person confined in the penitentiary who has been twice convicted of a felony since the passage of chapter 187, acts of the thirty-fifth general assembly, it follows that the order made by the board of parole designating Rudolph Davis and others

should be canceled and that no prisoner should be designated by the commission named upon whom the operation should be performed who has not been twice convicted of a felony subsequent to the passage of the act" etc. A copy of said opinion is hereto attached, marked Exhibit "B" and made a part of this motion.

Thereafter and on the 15th day of April, 1914, the Board of Parole, together with J. C. Sanders, warden of the penitentiary at Ft. Madison, and A. F. Philpott, the physician of said penitentiary, met at Des Moines, Iowa, and in harmony with the opinion given by the attorney general of the state of Iowa on the 1st day of April, 1914, and also the previous opinion given by the attorney general of the state of Iowa on the 21st day of October, 1913, re-
31 scinded and canceled said order of said commission composed of said Board of Parole and the said J. C. Sanders, warden, and the said A. F. Philpott, physician, designating Rudolph Davis and other prisoners confined in said penitentiary upon whom the operation of vasectomy should be performed. A copy of said proceeding of said commission is hereto attached, marked exhibit "C" and made a part of this motion.

The complainant not having been twice convicted of a felony subsequent to the passage of chapter 187, acts of the thirty-fifth general assembly, and there being no prisoner now confined in the penitentiary who has been twice convicted of a felony subsequent to the passage of the act, and the Board of Parole having canceled all orders designating persons confined in the penitentiary who have been convicted of a felony but once since the passage of the act, thus following the official opinion given by the attorney general of the state of Iowa, it follows that the question is wholly academic, that the complainant in question is not prejudiced by reason of chapter 187, acts of the thirty-fifth general assembly, and has no right to further maintain this suit, and especially has no right to have a hearing upon the constitutionality of said chapter 187, acts of the thirty-fifth general assembly,—

Wherefore Defendants pray that complainant's bill with amendments be dismissed.

(Sgd.) GEORGE COSSON,
Attorney General, Attorney for Defendants.

(Endorsed:) Filed April 17th, 1914. Wm. C. McArthur, Clerk.

32 EXHIBIT "A."

Copy.

Dear Sir: I am in receipt of your communication directing my attention to chapter 187, acts of the thirty-fifth general assembly, relating to the prevention of the procreation of certain delinquents and defectives, and requesting to be advised,—

1st. As to whether the act applies to prisoners confined in the penal institutions referred to in said act who were convicted prior to

the taking effect of said act; that is to say prior to the 4th day of July, 1913; and

2d. Does the act include persons convicted of misdemeanors and confined in jails and minor prisons of the state.

First. The question is not free from difficulty. In this question is involved (*a*) the intention of the legislature, that is to say, whether or not the legislature intended the act to apply to persons confined or convicted prior to the taking effect of the act; and (*b*) if the legislature did so intend, is the act constitutional.

Assuming then that the legislature intended the act to apply to persons convicted or sentenced prior to the taking effect of said act, the same would be unconstitutional as being ex post facto if it may be considered as a means of punishment or even if it contained directly an element of punishment. If, however, it is looked upon wholly as a sanitary and police measure in the interest of society at large, and directly in the interest of the possible offspring of the persons referred to in the act, then it would clearly not be unconstitutional.

It is a cardinal principle of construction that every act should be so construed as to relieve it of grave constitutional questions if possible. This being true, and it also being uncertain as to whether it was the intention of the general assembly to make the act apply to persons convicted of crime prior to the taking effect of the
33 act I am of the opinion that the act should be construed to apply only to those persons who have been convicted of crime subsequent to the taking effect of said act.

Second. After a careful consideration of the entire act I am clearly of the opinion that it was not the intention of the legislature to include therein misdemeanants or persons confined in county and city jails.

Respectfully submitted.

(Signed) GEORGE COSSON,
Attorney General.

October 21, 1913.

Hon. W. H. Berry, Chairman Board of Parole, Des Moines, Iowa.

34 EXHIBIT "B."

Copy.

Gentlemen: On the 17th of July, 1913, your board submitted the following questions to the Department of Justice with a request for an official opinion thereon:

1st. "Do the prisoners confined in the prisons named above whose crime was committed before the taking effect of the act referred to, come under the provisions thereof?

2d. "Does the act include persons convicted of misdemeanors confined in jails and minor prisons of the state?"

On the 21st of October, 1913, an official opinion was given in which it was held that the act did not include misdemeanants or per-

sons confined in county and city jails. In discussing the first proposition it was said:

"The first question is not free from difficulty. In this question is involved (*a*) the intention of the legislature; that is to say, whether or not the legislature intended the act to apply to persons confined or convicted prior to the taking effect of the act; and (*b*) if the legislature did so intend, is the act constitutional?"

In discussing the question I there said that "Assuming that the legislature intended the act to apply to persons convicted or sentenced prior to the taking effect of said act, the same would be unconstitutional as being ex post facto if it may be considered as a means of punishment or even if it contained directly an element of punishment": and that "It is a cardinal principle of construction that every act should be so construed as to relieve it of grave constitutional questions if possible"; and that "This being true, and it also being uncertain as to whether it was the intention of the general assembly to make the act apply to persons convicted of crime prior to the taking effect of the act, I am of the opinion that the act should be so construed as to apply only to those persons who have been convicted of crime subsequent to the taking effect of said act."

35 The precise question now presented by the complaint filed by George B. Stewart on behalf of Rudolph Davis seems not to have been passed upon in that opinion, viz: Was it the intention of the legislature that both convictions should be subsequent to the taking effect of the act?

It will be noticed that the language used by the general assembly is general in its nature, and after a careful consideration of the act, I am of the opinion that the act should be so construed as to require that both convictions of a felony must be subsequent to the passage of the act. This being true, and there now being no person confined in the penitentiary who has been twice convicted of felony since the passage of chapter 187, acts of the thirty-fifth general assembly, it follows that the order made by the board of parole designating Rudolph Davis and others should be canceled and that no prisoner should be designated by the commission named upon whom the operation should be performed who has not been twice convicted of a felony subsequent to the passage of the act. Since the act does not make it clear whether both convictions should be had in the state of Iowa, and as it is well known that what is a felony in one state may be a misdemeanor in another state, and vice versa, and since the thirty-sixth general assembly will convene on the second Monday in January, 1915, I suggest that no further action be taken under this particular section of the act until the general assembly has an opportunity to make the provision in question more specific.

This opinion is limited to the construction to be placed upon the single phrase under consideration, viz: a prisoner "who has been twice convicted of a felony."

(Signed) GEORGE COSSON,
Attorney General of Iowa.

April 1, 1914.

Honorable Board of Parole.

36 EXHIBIT "C."

Copy.

Minutes of Meeting of the Board for the Administration of the Law as Found in Chapter 185 *of the Acts of the Thirty-fifth General Assembly.*

The Board of Parole, together with J. C. Sanders, Warden of the Penitentiary at Fort Madison, and A. F. Philpott, Physician of said Penitentiary, met at Des Moines, Iowa, April 15, 1914, called to order, and on motion of J. E. Howe, the following preamble and resolution was adopted:

Whereas, at a meeting of this board held at Fort Madison, Iowa, on February 14, 1914, it was ordered that the operation of vasectomy be performed by the physician of said prison on the following named prisoners confined in said Penitentiary, to-wit:

#10405—Harry Delmar
10406—Rudolph Davis
10409—W. J. McArtor
10414—John Ryan
10434—Jake Mann
10440—Peter Stark
10441—D. O. Martin
10448—Ed Turnipseed
10453—William O'Gara
10455—S. H. Keeler
10462—Fred Trask
10464—Charles King
10473—William Kinney
10475—Charles Davis
10477—Claude Brasher
10478—David Dyer
10481—Thomas Burns
10485—Charles Reide
10491—Joe Murphy
10492—Fred Carson
10494—John Singleton
10497—Oscar Carlson
10499—Frank Sanders

all for the reason that each of said prisoners had been twice convicted of a felony and for that reason under the Act of the Thirty-fifth General Assembly of the State of Iowa providing for sterilization of prisoners should be sterilized; and,

Whereas, in each of said cases one of such felonies had been committed since the taking effect of said Act, and in each of said
37 cases one of the felonies of which the prisoner had been convicted was committed before the taking effect of the said Act; and,

Whereas, the Attorney General of Iowa now has filed with this board his written opinion, holding that the proper construction of the provisions of said act which requires that the operation of vasectomy should be performed on every prisoner in the Penitentiary of Iowa who has been twice convicted of a felony, would require that both of the crimes of which he was convicted must have been committed since the taking effect of said Act, and therefore does not apply in any of the above named cases;

Therefore resolved, that because of the construction of said Act by the Attorney General of Iowa, we reconsider the motion by which the operation of vasectomy was ordered to be performed in each of the above cases.

Moved by A. F. Philpott that the motions made February 14, 1914 that the operation of vasectomy be performed on

#10405—Harry Delmar
10406—Rudolph Davis
10409—W. J. McArtor
10414—John Ryan
10434—Jake Mann
10440—Peter Stark
10441—D. O. Martin
10448—Ed Turnipseed
10453—William O'Gara
10455—S. H. Keeler
10462—Fred Trask
10464—Charles King
10473—William Kinney
10475—Charles Davis
10477—Claude Brasher
10478—David Dyer
10481—Thomas Burns
10485—Charles Reide
10491—Joe Murphy
10492—Fred Carson
10494—John Singleton
10497—Oscar Carlson
10499—Frank Sanders

be laid on the table. The motion prevailed.

Moved by D. C. Mott that the board be now adjourned, subject to the call of the chairman. The motion prevailed.

38 The board adjourned.

(Signed) W. H. BERRY, *Chairman.*
A. F. PHILPOTT, *Secretary.*

39 And thereafter to-wit: On the 22nd day of April A. D. 1914 there was filed in said cause a resistance to the Application for Temporary Injunction which is in words and figures as follaws to-wit:

In the District Court of the United States in and for the Southern District of Iowa, Eastern Division, at Keokuk, April Term, A. D. 1914.

RUDOLPH DAVIS, Plaintiff,

vs.

WILLIAM H. BERRY, JOHN E. HOWE, and DAVID C. MOTT, Constituting the Board of Parole of Iowa; James C. Sanders, Warden and Managing Officer of the Penitentiary at Fort Madison, Iowa, and Austin F. Philpott, Physician of said Penitentiary, Defendants.

Resistance to Application for Temporary Injunction.

Come now defendants and for resistance to complainant's application for temporary injunction state:

On the 17th day of July, 1913, W. H. Berry, chairman of the Board of Parole, did, on behalf of the board and the commission named in chapter 187, acts of the thirty-fifth general assembly, direct a written communication to the attorney general of the state of Iowa requesting an interpretation of said chapter 187, acts of the thirty-fifth general assembly, and specifically requesting an official opinion of the attorney general as to whether or not "prisoners confined in the prisons * * * whose crimes were committed before the taking effect of the act referred to come under the provisions thereof."

In response to this inquiry the attorney general of the state of Iowa did on the 21st day of October, 1913, give an official opinion to the said W. H. Berry, chairman of the Board of Parole, in which it was held that "The act (chapter 187 acts of the thirty-fifth general assembly) should be construed to apply only to those persons who have been convicted of crime subsequent to the taking effect of said act." A copy of said opinion is hereto attached, marked Exhibit "A" and made a part hereof.

Thereafter and during the month of March, 1914, said Board of Parole requested an official opinion of the attorney general as to whether or not chapter 187, acts of the thirty-fifth general assembly, should be construed as applying to persons confined in the penal institutions of this state who have not been twice convicted of a felony subsequent to the taking effect of said chapter 187, acts of the thirty-fifth general assembly.

On the 1st day of April 1914 an official opinion was given by the attorney general of the state of Iowa in which it was held that "The act should be so construed as to require that both of the felonies must be subsequent to the passage of the act" and that "this being true, and there now being no person confined in the penitentiary who has been twice convicted of a felony since the passage of chapter 187, acts of the thirty-fifth general assembly, it follows that the order made by the board of parole designating Rudolph Davis and others should be cancelled and that no prisoner should be designated by the commission named upon whom the operation should be performed who has not been twice convicted of a felony subsequent to

the passage of the act," etc. A copy of said opinion is hereto attached, marked Exhibit "B" and made a part of this motion.

Thereafter and on the 15th day of April, 1914, the Board of Parole, together with J. C. Sanders, warden of the penitentiary at Ft. Madison, and A. F. Philpott, the physician of said penitentiary, met at Des Moines, Iowa, and in harmony with the opinion given by the attorney general of the state of Iowa on the 1st day of April, 1914, and also the previous opinion given by the attorney general of the state of Iowa on the 21st day of October, 1913, rescinded and cancelled said order of said commission composed of said Board
41 of Parole and the said J. C. Sanders, warden, and the said A. F. Philpott, physician, designating Rudolph Davis and other prisoners confined in said penitentiary upon whom the operation of vasectomy should be performed. A copy of said proceeding of said commission is hereto attached marked Exhibit "C" and made a part of this motion.

The complainant not having been twice convicted of a felony subsequent to the passage of chapter 187, acts of the thirty-fifth general assembly, and there being no prisoner now confined in the penitentiary who has been twice convicted of a felony subsequent to the passage of the act, and the Board of Parole having cancelled all orders designating persons confined in the penitentiary who have been convicted of a felony but once since the passage of the act, thus following the official opinion given by the attorney general of the state of Iowa, it follows that the question is wholly academic, and that the complainant in question is not prejudiced by reason of chapter 187, acts of the thirty-fifth general assembly, all of which will more fully appear by reference to the affidavits of Austin F. Philpott and J. C. Sanders, hereto attached, marked Exhibits "D" and "E" respectively and made a part hereof. Hence complainant has no right to further maintain this suit, and especially has no right to have a hearing upon the constitutionality of Chapter 187, acts of the thirty-fifth general assembly.

Wherefore defendants pray that complainant's bill with amendments be dismissed.

(Sgd.) GEORGE COSSON,
Attorney General, Attorney for Defendants.

(Endorsed:) Filed April 22nd, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

42 EXHIBIT "A."

Copy.

Dear Sir: I am in receipt of your communication directing my attention to chapter 187, acts of the thirty-fifth general assembly relating to the prevention of the procreation of certain delinquents and defectives, and requesting to be advised,—

1st. As to whether the act applies to prisoners confined in the

penal institutions referred to in said act who were convicted prior to the taking effect of said act; that is to say prior to the 4th day of July, 1913; and

2d. Does the act include persons convicted of misdemeanors and confined in jails and minor prisons of the state?

First. The first question is not free from difficulty. In this question is involved (*a*) the intention of the legislature, that is to say, whether or not the legislature intended the act to apply to persons confined or convicted prior to the taking effect of the act; and (*b*) if the legislature did so intend, is the act constitutional.

Assuming then that the legislature intended the act to apply to persons convicted or sentenced prior to the taking effect of said act, the same would be unconstitutional as being ex post facto if it may be considered as a means of punishment or even if it contained directly an element of punishment. If, however, it is looked upon wholly as a sanitary and police measure in the interest of society at large, and directly in the interest of the possible offspring of the persons referred to in the act, then it would clearly not be unconstitutional.

It is a cardinal principle of construction that every act should be so construed as to relieve it of grave constitutional questions if possible. This being true, and it also being uncertain as to whether it was the intention of the general assembly to make the act apply to persons convicted of crime prior to the taking effect of
43 the act I am of the opinion that the act should be construed to apply to those persons who have been convicted of crime subsequent to the taking effect of said act.

Second. After a careful consideration of the entire act I am clearly of the opinion that it was not the intention of the legislature to include therein misdemeanants or persons confined in county and city jails.

Respectfully submitted,

(Signed) GEORGE COSSON,
Attorney General.

October 21, 1913.

Hon. W. H. Berry, Chairman Board of Parole, Des Moines, Iowa.

(Endorsed:) Filed April 22, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

44 EXHIBIT "B."

Copy.

Gentlemen: On the 17th of July, 1913, your board submitted the following questions to the Department of Justice with a request for an official opinion thereon:

1st. "Do the prisoners confined in the prisons named above whose crime was committed before the taking effect of the act referred to, come under the provisions thereof?

2d. "Does the act include persons convicted of misdemeanors confined in jails and minor prisons of the states?"

On the 21st of October, 1913, an official opinion was given in which it was held that the act did not include misdemeanants or persons confined in county and city jails. In discussing the first proposition it was said:

"The first question is not free from difficulty. In this question is involved (*a*) the intention of the legislature; that is to say, whether or not the legislature intended the act to apply to persons confined or convicted prior to the taking effect of the act; and (*b*) if the legislature did so intend, is the act constitutional?"

In discussing the question I there said that "Assuming that the legislature intended the act to apply to persons convicted or sentenced prior to the taking effect of said act, the same would be unconstitutional as being ex post facto if it may be considered as a means of punishment or even if it contained directly an element of punishment"; and that "It is a cardinal principle of construction that every act should be so construed as to relieve it of grave constitutional questions if possible"; and that "This being true, and it also being uncertain as to whether it was the intention of the general assembly to make the act apply to persons convicted of crime prior to the taking effect of the act, I am of the opinion that the act should be so construed as to apply only to those persons who have been convicted of crime subsequent to the taking effect of said act."

The precise question now presented by the complaint filed by George B. Stewart on behalf of Rudolph Davis seems not to have been passed upon in that opinion, viz: Was it the intention of the legislature that both convictions should be subsequent to the taking effect of the act?

It will be noticed that the language used by the general assembly is general in its nature, and after a careful consideration of the act, I am of the opinion that the act should be so construed as to require that both convictions of a felony must be subsequent to the passage of the act. This being true, and there now being no person confined in the penitentiary who has been twice convicted of felony since the passage of chapter 187, acts of the thirty-fifth general assembly, it follows that the order made by the board of parole designating Rudolph Davis and others should be canceled and that no prisoner should be designated by the commission named upon whom the operation should be performed who has not been twice convicted of a felony subsequent to the passage of the act. Since the act does not make it clear whether both convictions should be had in the state of Iowa, and as it is well known that what is a felony in one state may be a misdemeanor in another state, and vice versa, and since the thirty-sixth general assembly will convene on the second Monday in January, 1915, I suggest that no further action be taken under this particular section of the act until the general assembly has an opportunity to make the provision in question more specific.

This opinion is limited to the construction to be placed upon the

single phrase under consideration, viz: a prisoner "who has been twice convicted of a felony."

(Sgd.) GEORGE COSSON,
Attorney General of Iowa.

April 1, 1914.

Honorable Board of Parole.

(Endorsed:) Filed April 22, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

46 EXHIBIT "C."

Copy.

Minutes of Meeting of the Board for the Administration of the Law as Found in Chapter 185 of the Acts of the Thirty-fifth General Assembly.

The Board of Parole, together with J. C. Sanders, Warden of the Penitentiary at Fort Madison, and A. F. Philpott, Physician of said Penitentiary, met at Des Moines, Iowa, April 15, 1914, called to order, and on motion of J. E. Howe, the following preamble and resolution was adopted:—

Whereas, at a meeting of this board held at Fort Madison Iowa, on February 14, 1914, it was ordered that the operation of vasectomy be performed by the physician of said prison on the following named prisoners confined in said Penitentiary, towit:

10405—Harry Delmar
10406—Rudolph Davis
10409—W. J. McArtor
10414—John Ryan
10434—Jake Mann
10440—Peter Stark
10441—D. O. Martin
10448—Ed Turnipseed
10453—William O'Gara
10455—S. H. Keeler
10462—Fred Trask
10464—Charles King
10473—William Kinney
10475—Charles Davis
10477—Claude Brasher
10478—David Dyer
10481—Thomas Burns
10485—Charles Reide
10491—Joe Murphy
10492—Fred Carson
10494—John Singleton
10497—Oscar Carlson
10499—Frank Sanders

all for the reason that each of said prisoners had been twice convicted of a felony and for that reason under the Act of the Thirty-fifth General Assembly of the State of Iowa providing for
47 sterilization of prisoners should be sterilized; and,

Whereas, in each of said cases one of such felonies had been committed since the taking effect of said act, and in each of said cases one of the felonies of which the prisoner had been convicted was committed before the taking effect of the said Act; and

Whereas, the Attorney General of Iowa now has filed with this board, his written opinion, holding that the proper construction of the provisions of said act which requires that the operation of vasectomy should be performed on every prisoner in the Penitentiary of Iowa who has been twice convicted of a felony, would require that both of the crimes of which he was convicted must have been committed since the taking effect of said Act, and therefore does not apply in any of the above named cases;

Therefore resolved, that because of the construction of said Act by the Attorney General of Iowa, we reconsider the motion by which the operation of vasectomy was ordered to be performed in each of the above cases.

Moved by A. F. Philpott that the motions made February 14, 1914, that the operation of vasectomy be performed on

#10405—Harry Delmar
10406—Rudolph Davis
10409—W. J. McArtor
10414—John Ryan
10434—Jake Mann
10440—Peter Stark
10441—D. O. Martin
10448—Ed Turnipseed
10453—William O'Gara
10455—S. H. Keeler
10462—Fred Trask
10464—Charles King
10473—William Kinney
10475—Charles Davis
10477—Claude Brasher
10478—David Dyer
10481—Thomas Burns
10485—Charles Reide
10491—Joe Murphy
10492—Fred Carson
10494—John Singleton
10497—Oscar Carlson
10489—Frank Sanders.

be laid on the table. The motion prevailed.

Moved by D. C. Mott that the board be now adjourned, subject to the call of the chairman. The motion prevailed.

48 The board adjourned.

(Signed) W. H. BERRY, *Chairman.*
A. F. PHILPOTT, *Secretary.*

(Endorsed:) Filed April 22, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

49 EXHIBIT "D."

United States District Court, Southern District of Iowa.

RUDOLPH DAVIS, Plaintiff,
vs.
WILLIAM H. BERRY et al., Defendants.

Before Hon. Smith McPherson, Judge, Sitting at Keokuk.

Affidavit.

STATE OF IOWA,
County of Lee:

I, Austin F. Philpott, Prison Physician at the State Penitentiary at Ft. Madison, Iowa, on oath depose and say relative to the above entitled cause, and to the opinion of the Attorney General of the State of Iowa, attorney for the defendants above named, that I am in accord with the opinion of the said Attorney General relating thereto, and I hereby state under oath that the operation known as that of visectomy for the sterilization of certain prisoners mentioned and described in chapter one hundred eighty seven (187) of the Acts of the Thirty-fifth General Assembly of the State of Iowa, will not now or at any time in the future be performed, or attempted to be performed by me, or under my authority, or by my direction or consent, under and by virtue of the provisions of said law so long as the same shall remain in form and effect as it appears in chapter one hundred eighty seven aforesaid.

(Sgd.) AUSTIN F. PHILPOTT.

Subscribed and sworn to before me this 21st day of April 1914.

[SEAL.] A. C. ROWLAND,
Notary Public in and for the County of Lee, State Aforesaid.

My commission expires July 1, 1915.

(Endorsed:) Filed April 22, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

50 EXHIBIT "E."

United States District Court, Southern District of Iowa.

RUDOLPH DAVIS, Plaintiff,
vs.
WILLIAM H. BERRY et al., Defendants.

Before Hon. Smith McPherson, Judge, Sitting at Keokuk.

Affidavit.

STATE OF IOWA,
County of Lee, ss:

I, J. C. Sanders, Warden of the Iowa State Penitentiary at Ft. Madison, Iowa, on oath deposie and say relative to the above entitled cause, and to the opinion of the Attorney General of the State of Iowa, attorney for the defendants above named, that I am in accord with the opinion of the said Attorney General relating thereto, and I hereby state under oath that the operation known as that of visectomy for the sterilization of certain prisoners mentioned and described in chapter one hundred eighty seven (187) of the Acts of the Thirty Fifth General Assembly of the State of Iowa, will not now or at any time in the future be performed, or attempted to be performed by me under and by virtue of the provisions of said law so long as the same shall remain in form and effect as it appears in chapter one hundred eighty seven aforesaid.
(Sgd.) J. C. SANDERS.

Subscribed and sworn to before me this the 21st day of April, 1914.
[SEAL.] A. C. ROWLAND,
Notary Public.

(Endorsed:) Filed April 22, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

51 And thereafter, to wit: on the 24th day of June, A. D. 1914, an Opinion was filed in said cause, which is in words and figures as follows, to wit:

In the District Court of the United States in and for the Southern District of Iowa, Eastern Division.

No. 9-A. Equity.

RUDOLPH DAVIS, Complainant,
against
WILLIAM H. BERRY, JOHN F. HOWE, DAVID D. MOTT, JAMES C. SANDERS, and AUSTIN F. PHILPOT, Defendants.

Opinion.

George B. Stewart of Fort Madison, Iowa, for complainant; George Cosson of Des Moines, Iowa, Attorney General of Iowa, for defendants.

Before Walter I. Smith, Circuit Judge; John C. Pollock and Smith McPherson, District Judges.

SMITH MCPHERSON, *District Judge:*

The complainant is a prisoner in the Iowa penitentiary. Defendants Berry, Howe and Mott constitute the Iowa board of Parole; Sanders is the warden, and Philpott is the physician of the penitentiary.

The case is one of diversity of citizenship, with federal questions presented by a bill in equity with an application for a temporary injunction to restrain defendants as state officers from enforcing chapter 187 of the acts of the thirty-fifth general assembly (1913), authorizing a surgical operation called vasectomy on idiots,
52 feeble-minded, drunkards, drug-fiends, epileptics, syph-litics, moral and sexual perverts, and mandatory as to criminals who have been twice convicted of a felony.

Complainant has been twice convicted of a felony, one of which was prior to the enactment of the statute in question (and in another state), and the other since (in this state), and for the latter he is now imprisoned. The defendant board of parole in February, 1914, made an order that the operation should be performed upon certain designated prisoners, including the complainant. This action was brought by the complainant for the purpose of enjoining each and every of the defendants from subjecting him to the operation. Since the action was instituted the board of parole under a written opinion of the attorney general of the state has rescinded its order, and they and the prison physician say they will observe such opinion. The opinion of the attorney general is based upon the proposition that the statute is ex post facto if either of the convictions was for an offense committed prior to the enactment of the statute. Complainant's counsel in argument conceded the statute is not an ex post facto one.

The attorney general was in error when he advised the board of

parole that the statute in question is void by reason of it being ex post facto, except only as to prisoners who have been twice convicted for felonies committed since the enactment of the statute. The statute under any construction is not an ex post facto one. State of Iowa ex rel. Gregory vs. Jones, 128 Fed. Rep. 626; Kelly vs. People, 115 Ill. 583 (4 N. E. 644); Commonwealth vs. Graves, 155 Mass. 163 (29 N. E. 579); Sturtevant vs. Commonwealth, 158 Mass. 598 (33 N. E. 648); In re Miller, 68 N. W. 990 (Michigan); Blackburn vs. State, 50 Ohio State, 428 (36 N. E. 18); Moore vs. State of Missouri, 159 U. S. 673; Cooley's Constitutional Limitations, 7th Ed. 382; State vs. Dowden, 137 Iowa, 573; Graham vs. West Virginia, 224 U. S. 616. He is not being subjected to the operation for that which was by him done prior to the enactment of the statute, but because he voluntarily brings himself within a class covered by the statute, and he does this subsequent to the enactment of the statute.

53 The attorney general also advised the board of parole that the statute should be so construed as to be applicable only to prisoners who have been twice convicted of felonies committed since the enactment of the statute. Section 26, article 3, of the Iowa constitution provides that a statute shall take effect July 4th following its enactment, or, if enacted at a special session, then at the expiration of ninety days after adjournment; or, in case of a declared emergency, by the publication thereof. But the attorney general to maintain the proposition that the law is ex post facto as applied to one who was convicted the one time prior to the statute is doing violence to the state constitution by contending that the statute would be effective only as to any prisoner many years after its enactment.

The defendant board of parole by rescinding the order subjecting complainant to the surgical operation, and the defendant warden and physician through the attorney general now insist that an injunction should not issue because it will serve no purpose. There are two answers to this: death, resignation, and expiration of terms of office will bring other men into the positions now held by the defendants who may not entertain the same views as these defendants. The opinion of the attorney general is advisory only and is not at all binding on either these defendants or their successors in office.

Again, the statute in question provides that certain persons may be subjected to the surgical operation; but the latter part of section 1 provides that such operations shall be performed upon prisoners who have been twice convicted of a felony, such as the complainant.

It is the duty of an officer to follow the mandates of the statute. Of course, every officer must act at his peril under a statute that another party claims to be unconstitutional and void; but where a person will suffer an irreparable injury if the statute is carried out, the presumption is that such statute will be observed and that an injunction should issue to enjoin the enforcement of a void statute. Williams vs. Boynton, 147 N. Y. 426 (42 N. E. 184); Osborne
54 vs. Bank, 9 Wheaton, 739, 840; 2 High on Injunctions (4th edition), section 310.

Complainant in his verified bill alleges that the statute is in violation of the United States constitution in that it is in effect a bill of attainder in that there is to be no indictment or trial; that the statute abridges his privileges, and that he is denied the equal protection of the laws; that he is denied due process of law; that the statute is in conflict with the Iowa constitution in that the statute denies the inalienable right to enjoy life, liberty and to pursue and obtain safety and happiness; that there is no jury trial awarded him, and that the statute provides cruel and unusual punishment.

The case presents important questions. Statutes like this are of recent years, the first one upon the subject enacted less than fifteen years ago. The question has been before appellate courts but twice. In one case, that of State of Washington vs. Feilen, 126 Pac. Rep. 75 (41 L. R. A., N. S., 418), the statute was upheld. The court held that the punishment was not cruel or unusual in the constitutional sense. That case involved a most heinous offense, that of the ravishment of a female child, and the statute provided that in addition to life imprisonment the jury and the court might determine whether he should be subjected to the operation of vasectomy. So that on the question now presented there was due process of law in that the matter was judicially determined. The other case, by the supreme court of New Jersey, was that of Smith vs. Board of Examiners, 88 Atl. Rep. 963. In that case the operation was to be performed upon a woman who was an epileptic, an inmate of a state charitable institution, and that court held that the statute was based upon an unreasonable police regulation and denied to her and persons of her class the equal protection of the laws as guaranteed by the fourteenth amendment.

The sole purpose of the operation is to destroy the power of procreation. The operation as originally performed was that of castration. In the twelfth century Henry II declared it treason
55 for any person to bring over any mandate from the pope or any one in authority in church affairs. This he made punishable as to secular clergymen by the loss of their eyes and by castration. Goldsmith's History of England, volume 1, page 88. In Weems vs. United States, 217 U. S. 349, 377, the fact that castration was once inflicted is recognized—and see the case of Whitton vs. Georgia, 47 Georgia, 301.

There is a difference between the operation of castration and vasectomy; castration being physically more severe than the other. But vasectomy in its results is much the coarser and more vulgar. But the purpose and result of the two operations are one and the same.

When Blackstone wrote his Commentaries he did not mention castration as one of the cruel punishments, quite likely for the reason that with the advance of civilization the operation was looked upon as too cruel and was no longer performed. But each operation is to destroy the power of procreation. It is of course to follow the man during the balance of his life. The physical suffering may not be so great, but that is not the only test of cruel punishment: the humiliation, the degradation, the mental suffering are always present

and known by all the public and will follow him wheresoever he may go. This belongs to the dark ages.

As of course all persons concede that it would be better for society if some men did not beget children: diseased, deformed, mentally weak children and criminally inclined, are brought into the world, oftentimes to their own shame and against the interest of the public. But are they not at the minimum? And must the marriage relation be formed under these newly-conceived laws based upon the brutalities of many centuries since and be allowed to take the place of the marriage relation formed along the true lines? Must the marriage relation be based and enforced by statute according to the teachings of the farmer in selecting his male animals to be mated with certain female animals only?

It is somewhat difficult to define with precision what is cruel and unusual punishment in the constitutional sense. Usually the length of imprisonment following a conviction is within the dis-
56 cretion of the legislative body, and we have an extreme case in O'Neil vs. Vermont, 144 U. S. 323, in which the judgment of the lower court was affirmed and the statute upheld. But quite a per cent of the bar of the country are of the opinion that the dissenting opinion by Justice Field (concurred in by Justices Brewer and Harlan) was the stronger.

No doubt delegates to the conventions, in providing against cruel punishment, had largely in mind what Blackstone had then recently written in volume 4, page 376, such as being drawn or dragged to the place of execution, emboweling alive, cutting off the hands or ears, branding on the face or hand, slitting the nostrils, placing the prisoner in the pillory, the ducking, the rack, and the torture, and, as in Spanish countries, crucifying. In a very few states of the Union the whipping post has been retained as a constitutional mode of punishment. But it will be found that the courts in those states have construed the statute thus imposing such punishment in the light of their history, and what had been done and was being done at the time of the adoption of their constitution. No one can doubt but that under our present civilization if castration were to be adopted as a mode of punishment for any crime, all minds would so revolt that all courts without hesitation would declare it to be a cruel and unusual punishment. As we understand it, castration was never inflicted after the revolution of 1688. So that if, as some now contend, it is now competent for a legislature to impose such punishment as existed by the common law, the validity of the statute providing for castration could not be upheld because that punishment was one imposed back of the time of the common law as, generally speaking, it comes down to us. In O'Neil vs. Vermont, 144 U. S. 323, and Weems vs. United States, 217 U. S. 349, and in re Kemler, 136 U. S. 436, all phases of the question are so presented as to leave nothing further to be said.

While it is true that there are differences between the two operations of castration and vasectomy, and while it is true that the effect upon the man would be different in several respects, yet the
57 fact remains that the purpose and the same shame and humiliation and degradation and mental torture are the same in

one case as in the other. And our conclusion is that the infliction of this penalty is in violation of the constitution which provides that cruel and unusual punishment shall not be inflicted.

This statute not only allows but commands the operation of vasectomy to be performed upon all twice convicted of a felony. A felony in Iowa is not only murder, arson, rape, counterfitting, and other serious crimes known as felonies at the common law, but they have been much extended under the Iowa statute, and some things are now felonies which until recently were misdemeanors with trials before a justice of the peace, or else no crime at all; wife abandonment, cutting electric light wires, breaking an electric globe, obstructing highway, unfastening a strap in a harness, and other things. So that if a person commits two or more of these, he is to be subjected to the operation if this statute is enforced.

And it is of no importance in argument whether the prison physician does this on his own motion or under an order of the state board of parole. The hearing is by an administrative board or officer. There is no actual hearing. There is no evidence. The proceedings are private. The public does not know what is being done until it is done. Witnesses are not produced, or if produced they are not cross-examined. What records are examined is not known. The prisoner is not advised of the proceedings until ordered to submit to the operation. And yet in many cases there will be involved a serious controverted question of fact. The records of two convictions may show the same name of the party or parties convicted; but there are many men of the same name, but which is no proof that the person in the one case is the same person convicted in the other case. It is common knowledge that many prisoners take assumed names. Who is to determine whether the various names represent one and the same person? And if one of the convictions was in another state, the question will arise whether it was for a felony.

58 These are inquiries that must be held in the open, with full opportunities to present evidence and argument for and against. To uphold this statute it must be affirmed that the board of parole or prison physician must hear the evidence and examine laws of other states without notice and in the prisoner's absence and determine these questions. And if determined adversely, the prisoner has no remedy but must submit to the operation.

In the case at bar, the hearing was a private hearing, and the prisoner first knew of it when advised of the order. Due process of law means that every person must have his day in court, and this is as old as magna charta: that sometime in the proceedings he must be confronted by his accuser and given a public hearing. Or as was stated in Leeper vs. Texas, 139 U. S. 462:

"Law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied."

Under the habital criminal laws of the state, if a prior conviction is relied on, the same must be pleaded and established by the evidence. But we have cases, this one included, in which the prior conviction has not been judicially established. But in Hayes vs. Mis-

souri, 120 U. S. 68, it was said that due process of law and the equal protection of the laws was secured if the laws operated on all alike and that all persons subject to the laws are treated alike under the limitations imposed. And the same holding was made in Duncan vs. Missouri, 152 U. S. 377.

And see: Lowe vs. Kansas, 163 U. S. 88; Jones vs. Brim, 165 U. S. 184; Magoun vs. Illinois Trust, 170 U. S. 294; Railroad vs. Matthews, 174 U. S. 105.

The cases are numerous and without conflict as to such holdings, and further citations need not be made.

But assuming that the prior convictions all appear of record, and assuming there is no conflict in the testimony and no difficulty in reaching the conclusion, but little or no advance is made in determining the question. If it be said that the statute automatically decides the question and nothing remains for the prison phy-
59 sician to do but to execute that which is already of record, then the statute becomes a bill of attainder. One of the rights of every man of sound mind is to enter into the marriage relation. Such is one of his civil rights, and deprivation or suspension of any civil right for past conduct is punishment for such co duct, and this fulfills the definition of a bill of attainder, because a ill of attainder is a legislative act which inflicts punishment withou a jury trial, as is fully discussed and held in the case of Cummings vs. Missouri, 71 U. S. 277, The Federalist, No. 44, by Madison; Justice Samuel F. Miller on the Constitution, 584; Watson on the Constitution, 733-738.

We hold the statute to be void, and unite in holding that a temporary writ of injunction should be issued as prayed.

Keokuk, Iowa, June 24, 1914.

SMITH, *Circuit Judge*, concurring:

The foregoing opinion is supported by a wealth of historical and other references and I do not wish to dissent from any portion of it. But the Iowa law does not provide for a judicial investigation of the identity of the prisoner with the one previously convicted of a felony as did the law in Washington construed in State vs. Feilen, referred to in the foregoing opinion. The fourteenth amendment to the federal constitution provides that no state shall deprive any person of life, liberty or property without due process of law. It seems so manifest to me that the law which provides that such operation (vasectomy or ligation of the Fallopian tubes) shall be performed by the physician of the institution or one selected by him upon any convict or inmate who has twice been convicted of a felony deprives the party in question of due process of law that it can scarcely be discussed. Suppose a person had been twice convicted of a felony and has served his entire time and should subsequently be an inmate of the penitentiary unconvicted of any crime, but simply held there for safe keeping, this law in its strictness would require the prison physician to perform the operation upon him in person or by
60 some person selected by such physician. It seems to me that the victim of this operation is so clearly deprived under this

statute of due process of law that an injunction must issue, and I therefore express no opinion upon the other interesting questions presented.

(Endorsed:) Filed June 24, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

61 And on the same day, towit: on the 24th day of June, A. D. 1914, an Order for Temporary Injunction was filed in said cause, which is in words and figures as follows, towit:

In the District Court of the United States in and for the Southern District of Iowa, Eastern Division.

No. 9–A. Equity.

RUDOLPH DAVIS, Complainant,
against
WILLIAM H. BERRY, JOHN F. HOWE, DAVID C. MOTT, JAMES C. SANDERS, and AUSTIN F. PHILPOTT, Defendants.

Order.

This case was heretofore presented by an application of complainant for a temporary injunction. Thereupon the resident judge of said court by written order designated Walter I. Smith, one of the United States circuit judges for this the eighth circuit, and John C. Pollock, the United States district judge for the district of Kansas, to sit with and assist him in the determination of said application for a temporary injunction herein.

After said designations had been made and made of record herein, the said application came on for hearing in open court at Keokuk, Iowa, viz., April 17, 1914, the complainant appearing by George B. Stewart, Esq., his solicitor, and the said defendants all appearing by George Cosson, Esq., attorney general of Iowa.

And after full argument the said application was fully submitted on the said application and the pleadings and was by the court taken under advisement.

And now at this time the court being fully advised, files a written opinion herein with a concurring opinion, each and both of which are now ordered of record and made a part hereof.

62 And it is further ordered that a temporary writ of injunction issue under the seal of this court restraining and enjoining the said William H. Berry, John F. Howe and David C. Mott, members of and composing the Iowa state board of parole, James C. Sanders, the warden of the Iowa state penitentiary at Fort Madison, Iowa, and Austin F. Philpott, the physician of said penitentiary, and the successors in office of each and every of said officers aforesaid from performing the operation of vasectomy on the said complainant, the Iowa statute chapter 187, acts of the 35th General Assembly, laws of Iowa, being unconstitutional, null and void.

And this order and the whole thereof will be and remain in full force until final hearing.

Witness our official signatures this June 24th, A. D. 1914.

(Signed) WALTER I. SMITH,
United States Circuit Judge.

(Signed) JOHN C. POLLOCK,
United States District Judge.

(Signed) SMITH McPHERSON,
United States District Judge.

(Endorsed:) Filed June 24th, 1914. Wm. C. McArthur, Clerk, by Frank Wahlgren, Deputy.

63 And thereafter, towit: on the 19th day of August, A. D. 1914, a Notice of Appeal was filed in said cause, which is in words and figures as follows, towit:

In the District Court of the United States, Southern District of Iowa, Eastern Division.

No. 9–A. In Equity.

RUDOLPH DAVIS, Plaintiff,
vs.
WILLIAM H. BERRY, JOHN E. HOWE, and DAVIS C. MOTT, Constituting the Board of Parole of Iowa; James C. Saunders, Warden and Managing Officer of the Penitentiary at Ft. Madison, Iowa, and Austin F. Philpott, Physician of said Penitentiary, Defendants.

Notice of Appeal.

The defendants named in the above entitled matter, and each of them, deeming themselves aggrieved by the decree and order entered in said above entitled proceeding on the 24th day of June, 1914, do hereby appeal from said decree and order to the supreme court of the United States, and they now pray that this appeal may be allowed and that the penal sum of the cost bond on such appeal will be fixed by this honorable court and that the transcript of the record, papers and proceedings upon which said order and decree were made, all duly authenticated, may be sent to the supreme court of the United States as by law provided.

(Signed) GEORGE COSSON,
Attorney General of Iowa,
HENRY E. SAMPSON,
Assistant Attorney General,
Attorneys for Defendants-Appellants.

Endorsed: Filed August 19th, 1914. Wm. C. McArthur, clerk, by Frank Wahlgren, deputy.

64 And thereafter, to-wit: on the 20th day of August, A. D. 1914, an Order allowing Appeal was filed in said cause, which is in words and figures as follows, to-wit:

In the District Court of the United States, Southern District of Iowa, Eastern Division.

RUDOLPH DAVIS, Plaintiff,

vs.

WILLIAM H. BERRY, JOHN E. HOWE, and DAVIS C. MOTT, Constituting the Board of Parole of Iowa; James C. Saunders, Warden and Managing Officer of the Penitentiary at Ft. Madison, Iowa, and Austin F. Philpitt, Physician of said Penitentiary, Defendants.

Order.

Now on this 20th day of August, 1914, this matter being presented upon the prayer of defendants for an appeal from the decree and order entered herein on the 24th day of June, 1914, said prayer of appeal of the defendants herein is hereby allowed and the penal sum for the cost bond of such appeal is fixed at One Hundred Dollars, the surety or sureties on such bond to be approved by the clerk of this court. Said bond shall not, however, be a supersedeas.

(Signed) SMITH McPHERSON,
Judge United States District Court.

(Endorsed:) Filed August 20th, 1914. Wm. C. McArthur, clerk, by Frank Wahlgren, deputy.

65 In the District Court of the United States, Southern District of Iowa, Eastern Division.

RUDOLPH DAVIS, Plaintiff,

vs.

WILLIAM H. BERRY, JOHN E. HOWE, and DAVID C. MOTT, Constituting the Board of Parole of Iowa; James C. Sanders, Warden and Managing Officer of the Penitentiary at Ft. Madison, Iowa, and Austin F. Philpott, Physician of said Penitentiary, Defendants.

Assignment of Errors.

Come now the defendants in the above entitled matter and as appellants therein assign the following errors, which appear upon the face of the record:

1. The court erred in holding that it had jurisdiction of the subject matter involved in this cause.

2. The court erred in holding that chapter 187, acts of the thirty-fifth general assembly of Iowa, applied to all convicts now confined in the penitentiary of the state of Iowa who have been twice con-

victed of felony, even though such convicts have not been twice convicted of felony within the state of Iowa subsequent to the enactment of said chapter.

3. The court erred in holding that chapter 187, acts of the thirty-fifth general assembly of Iowa, applied to all convicts now confined in the penitentiary of the state of Iowa who had been twice convicted of felony, even though one of said convictions was in a state other than the state of Iowa, and even though one of such convictions occurred prior to the time said chapter 187 became a law.

4. The court erred in overruling and disregarding the opinion of the board of control of the state of Iowa and of the attorney
66 general of the state of Iowa in their interpretation of chapter 187, acts of the thirty-fifth general assembly of Iowa, holding that said chapter only applied to those convicts now confined in the penitentiary of the state of Iowa who had been twice convicted of felony in the state of Iowa subsequent to the going into effect of said chapter 187.

5. The court erred in holding that the facts as shown by the record presented such a state of facts as would entitle complainant to a temporary injunction or to any other relief.

6. The court erred in passing upon the constitutionality of chapter 187, acts of the thirty-fifth general assembly of Iowa.

7. The court erred in holding chapter 187, acts of the thirty-fifth general assembly unconstitutional and void.

8. The court erred in not dismissing plaintiff's complaint as prayed for by defendants in their motion to dismiss said bill of complaint.

9. The court erred in issuing the temporary injunction and restraining order as shown by the record.

10. The court erred in entering the order and decree holding the said chapter 187, unconstitutional and in making permanent the temporary injunction and restraining order.

Wherefore, these defendants as appellants herein pray that the said orders and decrees entered in the above entitled cause be reversed and that such other orders be entered herein as shall be proper in the premises.

(S'g'd) GEORGE COSSON,
Attorney General.
HENRY E. SAMPSON,
Assistant Attorney General.

(Endorsed:) Filed August 27, 1914. Wm. C. McArthur, clerk.

67 In the District Court of the United States, Southern District of Iowa, Eastern Division.

RUDOLPH DAVIS, Plaintiff,

vs.

WILLIAM H. BERRY, JOHN E. HOWE, and DAVID C. MOTT, Constituting the Board of Parole of Iowa; James C. Saunders, Warden and Managing Officer of the Penitentiary at Ft. Madison, Iowa, and Austin F. Philpott, Physician of said Penitentiary, Defendants.

Appellants' Præcipe for Transcript.

To the Honorable Clerk of the United States District Court:

Please prepare, to be used for the purposes of an appeal, transcript of the following portions of the record in the above entitled cause:

Præcipe for Appearance for Defendants.
Complainant's Bill of Complaint.
Temporary Restraining Order.
Præcipe for Appearance for Plaintiff.
Waiver of Service of Restraining Order and Appearance for Defendant-.
Stipulation as to Time and Place for hearing.
Order designating Judges for Hearing Cause.
Motion for an Interlocutory Writ.
Order for continuance of Hearing.
Amendment to Bill of Complaint.
Motion by Defendant- to dismiss Bill.
Resistance to Appeal for Temporary Injunction.
Order and Final Decree.
Order fixing Appeal Bond.
Assignment of Errors.
Appeal Bond.
Præcipe for Transcript.
Citation with Proof of Service thereof.
Dated this 27 day of July, 1914.

(S'g'd) GEORGE COSSON,
Attorney General,
HENRY E. SAMPSON,
Assistant Attorney General,
Attorneys for Defendants-Appellants.

(Endorsed:) Filed August 31, 1914. Wm. C. McArthur, Clerk.

68 Due and legal service of the above præcipe for transcript is herby acknowledged and accepted this 29th day of July, 1914.

(S'g'd) GEORGE B. STEWART,
Attorney for Plaintiff.

69 And thereafter to-wit: On the 23rd day of September A. D. 1914 there was filed in said cause a bond on appeal which is in words and figures as follows to-wit:

In the District Court of the United States, Southern District of Iowa, Eastern Division.

No. 9 A. In Equity.

RUDOLPH DAVIS, Plaintiff,
vs.
WILLIAM H. BERRY, JOHN E. HOWE, and DAVID C. MOTT, Constituting the Board of Parole of Iowa; James C. Sanders, Warden and Managing Officer of the Penitentiary at Ft. Madison, Iowa, and Austin F. Philpott, Physician of said Penitentiary, Defendants.

Appeal Bond.

Know all men by these presents, That we, William H. Berry, John E. Howe, David C. Mott, James C. Sanders and Austin F. Philpott as principals and —— ——, —— ——, as sureties, are held and firmly bound to Rudolph Davis in the full and just sum of one hundred dollars ($100) to be paid to the said Rudolph Davis, his heirs, executors, administrators and assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 21 day of September in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at the April 1914 term of the District Court of the United States in and for the Southern District of Iowa, Eastern Division in a suit depending in said court between Rudolph Davis, plaintiff, and William H. Berry and others, defendants, *and* decree was rendered against the said defendants, and the said defendants have obtained an order of the said court to reverse the decree
70 in the aforesaid suit, and a citation directed to the said Rudolph Davis and admonishing him to be and appear in the Supreme Court of the United States at the city of Washington, D. C. Thirty (30) days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said William H. Berry, John E. Howe, David C. Mott, James C. Sanders and Austin F. Philpott shall prosecute said appeal to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

(S'g'd) W. H. BERRY.
D. C. MOTT.
J. E. HOWE.
J. C. SANDERS.
AUSTIN F. PHILPOTT.

The foregoing bond is hereby approved, in pursuance of an order of court dated August 20, 1914, this 23rd day of September A. D. 1914.

(S'g'd) WM. C. McARTHUR, *Clerk.*

(Endorsed:) Filed September 23rd, 1914. Wm. C. McArthur, Clerk.

71 UNITED STATES OF AMERICA,
Southern District of Iowa, ss:

I, Wm. C. McArthur, Clerk of the District Court of the United States for the Southern District of Iowa, hereby certify the foregoing 70 pages to contain a full, true and complete transcript of the record of cause No. 9—A—Eq. Eastern Division, wherein Rudolph Davis is Complainant and William H. Berry, John E. Howe and David C. Mott, constituting the Board of Parole of Iowa, et al., are Defendants, as called for in the præcipe for transcript of the record filed in said cause August 31, 1914, as full, true and complete as the original thereof now on file and of record in my office in the City of Keokuk in said District.

I further certify that I transmit herewith as part of said transcript the original Citation with acceptance of service thereof by Appellee's attorney.

In witness whereof, I hereunto set my hand and affix the seal of said court at office in the City of Keokuk in said District this 28th day of September A. D. 1914.

[Seal U. S. District Court, Southern District of Iowa.]

W. C. McARTHUR,
Clerk U. S. District Court,
Southern District of Iowa.

Endorsed on cover: File No. 24,409. S. Iowa D. C. U. S. Term No. 268. William H. Berry, John E. Howe, and Davis C. Mott, constituting the Board of Parole of Iowa, et al., appellants, vs. Rudolph Davis. Filed October 20th, 1914. File No. 24,409.

Office Supreme Court, U. S.
FILED
AUG 30 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 47

WILLIAM H. BERRY, JOHN E. HOWE, AND D. C. MOTT, CONSTITUTING THE BOARD OF PAROLE OF IOWA, et. al.

Plaintiffs in Error,

vs.

RUDOLPH DAVIS, Defendant in Error.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA

BRIEF FOR PLAINTIFFS IN ERROR

GEORGE COSSON, *Attorney General of Iowa,*
For Plaintiffs in Error.

ROSS R. MOWRY, *Assistant Attorney General,*
Of Counsel.

GEORGE B. STEWART,
Counsel for Defendant in Error.

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vs.

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For Plaintiffs in Error.

ROSS R. MOWRY, *Assistant Attorney General,*
Of Counsel.

GEORGE B. STEWART,
Counsel for Defendant in Error.

STATEMENT OF CASE.

The defendant in error (the complainant below) is a citizen and resident of the state of Louisiana and now confined in the Iowa state penitentiary at Fort Madison, Lee County, Iowa. The plaintiffs in error, Berry, Howe and Mott, constitute the Iowa Board of Parole; Sanders is the warden and Philpott is the physician of the penitentiary. All of the plaintiffs in error are residents of the state of Iowa.

The defendant in error, on the 27th of August, 1913, was convicted of breaking and entering under a judgment of the district court in and for Linn County, Iowa, and the court sentenced him to the Iowa state penitentiary for a period not exceeding ten years. (Transcript, pages 2 and 3.)

The case is one of diversity of citizenship with federal questions involved, the defendant in error asking, through a bill in equity, for a temporary injunction to restrain the plaintiffs in error, as state officers, from enforcing chapter 187 of the acts of the thirty-fifth general assembly (1913) authorizing a surgical operation called vasectomy on idiots, feeble-minded, drunkards, drug fiends, epileptics, syphilitics, moral and sexual perverts and as to criminals who have twice been convicted of a felony.

The defendant in error has been twice convicted of a felony, one of which was prior to the enactment of the statute in question (and in another state) and the other since (in the state of Iowa), and, for the latter, he is now in prison in the Iowa state penitentiary.

The plaintiffs in error, Berry, Howe and Mott, constituting the Iowa Board of Parole, in February, 1914, made an order that the operation should be performed upon certain prisoners confined in the penitentiary, including the defendant in error. This action was brought by the defendant in error for the purpose of enjoining each and all of the defendants from subjecting him to the operation.

After the action was commenced the board of parole submitted to the attorney general a request for an official opinion as to whether both convictions of a felony must be committed subsequent to the passage of the act.

On the first day of April, 1914, the attorney general of the state of Iowa in response to this request from said board of parole for an official opinion communicated to said board said official opinion in writing in which it was there held that the language of the act being general in its nature and there being nothing in the act to indicate whether both convictions must have been had in the state of Iowa, and it being well known that what is a felony in one state is often a misdemeanor in another state, sometimes punishable only by a small fine, that a fair construction of the act warranted in holding that it was the legislative intent that both convictions should be subsequent to the taking effect of the act in question; that this being true, and there being no person then confined in the penitentiary who had been twice convicted of a felony since the passage of the act, the order previously made by said board of parole designating Rudolph Davis and others as proper persons upon whom said operation should be performed, should be canceled and annulled.

Upon the first meeting of said board at the State House in Des Moines after the receipt of said opinion, and on the 15th day of April, 1914, in harmony with said official opinion said board of parole passed a resolution canceling its previous order. (Transcript pages 23 and 24).

Thereafter the attorney general of the state of Iowa filed a resistance to the application for temporary injunction setting forth the facts above stated, and in addition to the formal action taken by said board of parole, all members being present, the attorney general, as a part of his resistance, filed the affidavit of the prison physician in which affidavit said prison physician declared under oath that he would comply with the opinion of the attorney general and that the operation in question would not at the time or any time in the future be performed or attempted to be performed by said physician or under his direction or authority; and the warden, J. C. Sanders, also made affidavit which was attached and became a part of the resistance of the attorney general to the effect that he was the warden of the penitentiary and that he would not at the time or any time in the future perform or attempt to perform said operation in question under and by virtue of the provisions of said act of the thirty-fifth general assembly of the state of Iowa.

The court below granted a temporary writ of injunction, as prayed for in the bill of complaint of the defendant in error, the court holding that the statute in question was unconstitutional, null and void. The plaintiffs in error appeal to this court from the order and judgment of the lower court in issuing the temporary injunction.

STATUTE.

The statute in question is as follows:

Chapter 187.

Prevention of the Procreation of Habitual Criminals, Idiots, Feeble-Minded, Insane, and Diseased and Degenerate Persons.

H. F. 641.

An act to repeal the law as it appears in chapter one hundred twenty-nine (129) of the acts of the thirty-fourth general assembly, and to enact a substitute therefor relating to the prevention of the procreation of criminals, rapists, idiots, feeble-minded, imbeciles, lunatics, drunkards, drug fiends, epileptics, syphilitics, moral and sexual perverts, and diseased and degenerate persons.

Be it enacted by the General Assembly of the State of Iowa:

Section 1. That it shall be the duty of the state board of parole, with the managing officer and the physician of each public institution in the state, entrusted with the care and custody of criminals, rapists, idiots, feeble-minded, imbeciles, lunatics, drunkards, drug fiends, epileptics, syphilitics, moral and sexual perverts, and diseased and degenerate persons; and they are hereby authorized and directed to, annually or oftener, examine into the mental and physical condition, the records and family history of the inmates of such institution, with a view of determining whether it is improper or inadvisable to allow any of such inmates to procreate and to judge of such matters. If a majority of them decide that procreation by any of such inmates would produce children with a tendency to disease, deformity, crime, insanity, feeble-mindedness, idiocy, imbecility, epilepsy or alcoholism, or if the physical or mental condition of such inmate will probably be materially improved thereby, or if such inmate is an epileptic

or syphilitic, or gives evidence, while an inmate of such institution, that he or she is a moral or sexual pervert, then the physician of the institution, or one selected by him, shall perform the operation of vasectomy or ligation of the Fallopian tubes, as the case may be, upon such person. Provided that such operation shall be performed upon every convict or inmate of such institution who has been convicted of prostitution or violation of the law as laid down in chapter two hundred sixteen (216) of the acts of the thirty-third general assembly, or who has been twice convicted of other sexual offenses, including soliciting as defined in section four thousand nine hundred seventy-five-c (4975-c) of the supplement to the code, 1907, *or who has been twice convicted of a felony,* and each such convict or inmate shall be subjected to this same operation of vasectomy or ligation of the Fallopian tubes, as the case may be, by the physician of the institution, or one selected by him.

Section 2. Those afflicted with syphilis or epilepsy may apply to the board of parole, or any judge of the district court, and upon order of such board or judge, the operation of vasectomy or ligation of the Fallopian tubes may be performed upon such person, and any law restricting the marriage of such persons shall be void and of none effect, in case one of the contracting parties has submitted to such operation and the same was known to both parties before their marriage.

Section 3. The board of parole shall make an annual receedings under the authority of this act, and also observations and statistics regarding its benefits.

Section 4. Except as authorized in this act, every person who shall perform, encourage, assist in or otherwise promote the performance of either of the operations described in section one (1) of this act, for the purpose of destroying the power to procreate the human species, or any person who shall knowingly permit either of such operations to be performed upon such persons, unless the same shall be a medical necessity, shall be fined not more than one thousand dollars ($1,000.00), or imprisoned in the penitentiary not to exceed one year, or both.

Approved April 19, A. D. 1913.

ERRORS RELIED UPON.

I.

The court erred in holding that it had jurisdiction of the subject matter involved in this cause.

II.

The court erred in holding that chapter 187, acts of the thirty-fifth general assembly of Iowa, applied to all convicts now confined in the penitentiary of the state of Iowa who have been twice convicted of felony, even though such convicts have not been twice convicted of felony within the state of Iowa subsequent to the enactment of said chapter.

III.

The court erred in holding that chapter 187, acts of the thirty-fifth general assembly of Iowa, applied to all convicts now confined in the penitentiary of the state of Iowa who had been twice convicted of felony, even though one of said convictions was in a state other than the state of Iowa, and even though one of such convictions occurred prior to the time said chapter 187 became a law.

IV.

The court erred in overruling and disregarding the opinion of the board of parole of the state of Iowa and of the attorney general of the state of Iowa in their interpretation of chapter 187, acts of the thirty-fifth general assembly of the state of Iowa, holding that said chapter only applied to those convicts now confined in the penitentiary of the state of Iowa who had been twice convicted of felony in the state of Iowa subsequent to the going into effect of said chapter 187.

V.

The court erred in holding that the facts as shown by the record presented such a state of facts as would entitle complainant to a temporary injunction or to any other relief.

VI.

The court erred in passing upon the constitutionality of chapter 187, acts of the thirty-fifth general assembly of Iowa.

VII.

The court erred in holding chapter 187, acts of the thirty-fifth general assembly unconstitutional and void.

VIII.

The court erred in not dismissing plaintiff's complaint as prayed for by defendants in their motion to dismiss said bill of complaint.

IX.

The court erred in issuing the temporary injunction and restraining order as shown by the record.

X.

The court erred in entering the order and decree, holding the said chapter 187, unconstitutional and in entering the temporary injunction and restraining order.

ARGUMENT.

Part I.

The court erred in granting a temporary injunction.

It is such a fundamental and cardinal principle of law that no one is entitled to a temporary injunction unless he is about to suffer irreparable injury and that such injury is imminent, and that he has no legal remedy, that a discussion of the proposition or a citation of authorities is not only unnecessary, but seems almost a reflection upon the court.

This is especially true where the defendant in the presence of the chancellor or court proposes to do what the plaintiff asks in his bill.

Behn v. Young, 21 Ga. 207 at 213.

And the mere fact that the act is unconstitutional does not suffice to warrant the court in granting the injunction unless it is shown that the injury is irreparable, the danger imminent and that no legal remedy is available.

Shelton v. Platt, 139 U. S., 591;

Allen v. Pullman Palace Car Co., 139 U. S. 658;

Pacific Express Co. v. Siebert, 142 U. S. 339;

Pittsburgh, etc., Ry. Co. v. Board of Public Works, 172 U. S., 32;

Arkansas Building & Loan Association v. Madden, 175 U. S., 269.

There is not one discordant note in the unbroken line of authorities and this is true not only with reference to this court but the inferior federal courts, the state courts and the text writers.

The learned authority on "Injunctions" (see section 1329-a of the 4th Edition of High on Injunctions) states the doctrine as follows:

> "Where relief is sought against the enforcement of an unconstitutional statute, either state or federal, the unconstitutionality of the law is not alone sufficient to justify the granting of the writ, but irreparable injury must also be alleged and clearly proven, or some other special circumstance must be shown which brings the case under some recognized head of equity jurisdiction. And where the plaintiff fails to make such a showing, the relief will be denied and he will be left to his remedy at law."

The court in the case of *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, held that a state of things from which the plaintiff apprehends injurious consequences to himself, but which neither actually exists nor is threatened by the defendants, nor is inevitable, is not a sufficient ground for an injunction. That "It is obviously not fit that the power of the court should be invoked in this form for every theoretical or speculative violation of one's rights."

And in the very well considered case of *The People of the State of New York, complainants, v. Canal Board of the State of New York, respondents*, 55 N. Y. 391, the court said:

> "It is not enough that the canal board is a public body composed of state officers, charged with important duties affecting the public, and that they may act in hostility to the public interests under a void law, or that the attorney

general is apprehensive that they may so act; if it is not made to appear that they are acting or threatening to act, that is, if a state of facts does not actually exist which calls for relief by injunction, it will not be granted. * * * Injury, material and actual, *not fanciful or theoretical, or merely possible*, must be shown as the necessary or probable results of the action sought to be restrained."

It is equally fundamental that if a change of circumstances after the commencement of the suit relieves the defendant of the immediate injury, no temporary injunction should issue.

Behn v. Young, 21 Ga. 207;

Foster's Federal Practice, Vol. 1, p. 751;

In Re. Jackson, 9 Fed. 493;

In Re. Pitts, 9 Fed. 542.

So also must the injunction be denied where defendant states that he has no intention of doing the acts in question, and there is not a substantial or a preponderance of the evidence which shows to the contrary.

Benton v. Budd, 120 Cal. 329;

Lambert v. Alcorn, 144 Ill. 313;

Whalen v. Dalahsmutt, 59 Md. 250.

This proposition was announced by the Illinois court notwithstanding four witnesses testified to an assertion of the defendant to the contrary.

Lied v. Henderson, 991 Ill. 282.

The plain facts are that the court's opinion is based upon a wholly erroneous conception of the record in the case. The very basis of the granting of the temporary injunction is founded upon misconceptions. The court in its opinion (see page 33 of the transcript) falls into the first error when he states:

"The opinion of the attorney general is based upon the proposition that the statute is ex post facto if either of the convictions was for an offense committed prior to the enactment of the statute."

And again the court mis-stated the opinion of the attorney general when he states (Pages 33 and 34 of the transcript):

> "The attorney general was in error when he advised the board of parole that the statute in question is void by reason of it being ex post facto, except only as to prisoners who have been twice convicted for felonies committed since the enactment of the statute."

The opinion of the attorney general was based upon no such proposition, and the attorney general gave no such opinion either official or unofficial, oral or in writing. Before this controversy arose and before any suit was instituted, the board of parole submitted to the attorney general a request for an opinion as to whether the act in question applied to all persons in the penitentiary who had been twice convicted of a felony, and regardless of whether their convictions, that is to say, both convictions, were prior to the passage of the act, and it was in response to that request for an opinion that the attorney general transmitted to the said board of parole an official opinion with reference to whether the act applied to all prisoners confined in the penal institutions of the state who were convicted prior to the taking effect of the act, in which he said:

> "The question is not free from difficulty. In this question is involved (a) the intention of the legislature, that is to say; whether or not the legislature intended the act to apply to persons confined or convicted prior to the taking effect of the act; and (b) if the legislature did so intend, is the act constitutional.
>
> "Assuming then that the legislature intended the act to apply to persons convicted or sentenced prior to the taking effect of said act, the same would be unconstitutional as being ex post facto if it may be considered as a means of punishment or even if it contained directly an element of punishment. If, however, it is looked upon wholly as a sanitary and police measure in the interest of society at large, and directly in the interest of the possible offspring of the persons referred to in the act, then it would clearly not be unconstitutional." (Transcript pages 26 and 27.)

The attorney general then had under consideration whether the act contemplated the wholesale operation of every man in

the penal institutions of the state who had been twice convicted of a felony, the convictions taking place prior to the passage of the act, and even then it was clearly pointed out that unless the act was punitive in its nature it would not be ex post facto assuming that both convictions were had prior to the passage of the act.

What the attorney general held in that opinion was *that the legislature never intended the law to apply to persons who were convicted prior to the passage of the act.* Undoubtedly every one would concede the soundness of the opinion of the attorney general, towit: That if the law applied to persons convicted prior to the passage of the act, both convictions I mean, and second that the act was punitive in its nature, it would be ex post facto. But as before stated, the attorney general held that the law never contemplated that persons previously convicted should be subject to the provisions of the act in question.

Subsequently, however, and without further consultation with the attorney general, the board of parole assumed that one conviction subsequent to the passage of the act would bring the prisoner under the purview of the statute and proceeded to make the order including the defendant herein. After the institution of the suit by the plaintiff in error, the board of parole then submitted to the attorney general the question as to whether both convictions must be had subsequent to the passage of the act.

In response to that request, the attorney general called attention to his first opinion that the legislature never intended the act to apply to persons convicted prior to the taking effect of the act, and that the precise question as to whether both convictions should be subsequent to the taking effect of the act was not then considered, and concluded as follows:

> "It will be noticed that the language used by the general assembly is general in its nature, and after a careful consideration of the act, I am of the opinion that the act should be so construed as to require that both convictions of a felony must be subsequent to the passage of the act. This being true, and there now being no person confined in the penitentiary who has been twice convicted of felony since the passage of chapter 187, acts of the thirty-fifth general assembly, it follows that the order made by the board of parole designating Rudolph Davis and others should be canceled and that no prisoner should be

designated by the commission named upon whom the operation should be performed who has not been twice convicted of a felony subsequent to the passage of the act." (Exhibit B, Transcript pages 27-28.)

Read the copy of the official opinion which was the basis of the board's action in canceling the orders, it being designated as Exhibit B and copied in full on pages 27 and 28 of the official transcript, and not a line or a suggestion is made with reference to the act being ex post facto if the last conviction were had subsequent to the passage of the act.

The attorney general was perfectly familiar with the well settled doctrine that one conviction subsequent to the passage of the act was sufficient to relieve the act in question of any objection upon the ground of being an ex post facto act. This question has been passed upon numberless times in those states having habitual criminal acts.

See *Revised Laws*, Mass., 1902, Vol. 2, Sec. 21, Chapter 220;

McDonald v. Mass., 180 U. S. 311;

Graham v. West Virginia, 224 U. S. 616.

There are some very well reasoned cases by the Massachusetts courts, but in the Massachusetts statutes it made it very clear that one conviction subsequent to the taking effect of the law would be sufficient and in the Massachusetts statutes it was also designated that a previous conviction in that or any other state which was punished by a sentence in the penitentiary of a given time should satisfy the requirements of the act; whereas the Iowa statute is merely general in its terms, does not say whether the convictions must both be in Iowa, and this in addition to the fact, as before stated, that what is a penitentiary sentence in one state calls for only an insignificant punishment in another state, prompted the attorney general to hold that the Iowa statute drawn in such general language, without any reference where the convictions should be had, should be construed as to require that both convictions should be subsequent to the passage of the act.

This construction is for the purpose of effectuating the intent of the legislature and not because of any supposed unconstitutionality of the act, it being well known that a more severe punishment is justified against one whose previous

conduct is bad than against another whose previous conduct has been good.

If the court had taken the trouble to have read the opinions of the attorney general, it would not have fallen into such grievous error.

The court was also in error in holding that there was no duty upon the administrative officers to follow the opinion of the attorney general. The official opinion of the attorney general, when called for by a state department and received upon a matter of official business, is binding until overruled by the court, the legislature or some other official manner.

The attorney general of the state of Iowa is a constitutional officer. (See Article 5, section 12 of the Code of Iowa.)

The powers of the several attorneys general of the states are similar in their respective spheres to the powers of the attorney general of the United States, and the duties and authority of the attorney general of the United States and the attorney general of each state are similar to the powers of the chief law officer of England, where the attorney general is and has been from the time the memory of man runneth not to the contrary the chief law officer of the government.

3 Am. & Eng. Enc. of Law, page 475;

Enc. Laws of Eng., Vol. 1, page 624;

4 Reeves Hist. Eng. Law, chapter 26, page 151;

People v. Miner, 2 Lans., 396-398.

In the case of *People v. Miner*, 2 Lans., 396 on page 399, the supreme court of New York held that the attorney general has all "the powers belonging to the office at common law, and such additional powers as the legislature has seen fit to confer upon him."

To the same effect see *State ex rel Young vs. Robinson*, 101 Minn. 277.

Section 208, Supplemental Supplement, 1915, of the Code of Iowa, provides in part that "There shall be at the seat of government a department to be known as the department of justice, and the attorney general shall be the head thereof."

And Section 208 provides in part that "He shall give his opinion in writing upon all questions of law submitted to him by the general assembly, or either house thereof, the govern-

or, lieutenant governor, speaker of the house, * * * and to the heads of any other state departments now existing or hereafter created."

Both as a matter of law and as a matter of custom, the state departments of the several states and the departments of the federal government follow the opinions of the attorney general until they are overruled by some superior authority.

We then have this situation: the attorney general in an official opinion held that the law did not apply to the defendant in question or any person in the penitentiary, because neither the defendant nor any other person had been twice convicted of a felony subsequent to the passage of the act. The board of parole in a formal, official resolution canceled their previous order and declared their intention of being governed by the official opinion of the attorney general. In addition to that the warden who has actual charge of the penitentiary, and the prison physician, who would have personally directed the operation in the event that one was performed, both declared under oath that neither at the time nor at any time in the future would the operation be performed, and that the official opinion of the attorney general would be followed, and the attorney general on behalf of the state filed in court his resistance saying that no action either at the time or at any time in the future would ever be taken pursuant to the provisions of said act.

Considering then both the facts and the law, there was not one substantial reason for the court granting this temporary injunction. The court entirely misconceived the position taken by the attorney general. There was no threatened injury, either present or prospective. As soon as the board of parole discovered they had wrongfully construed the statute, they immediately canceled their order, the board of parole, the warden and the prison physician all announced in the most solemn manner that they would follow the opinion of the attorney general and had no intention at the time or at any time in the future of performing said operation. And in spite of the fact that a temporary injunction or interlocutory decree is issued only for the purpose of holding matters in statu quo until there can be a hearing on the merits of the case, the court granted a temporary injunction.

In our dual form of government, and in view of the state and interstate nature of our commerce, in the very nature of things, this court and inferior federal courts must have authority to hold statutes unconstitutional, but as this court has

said over and over again, this will never be done unless the statute is so clearly and palpably unconstitutional as to leave no reasonable doubt.

This court has zealously guarded the rights of the states but so great has been the abuse of the inferior federal courts that almost every important state statute covering fundamental reforms to meet industrial changes and additional abuses growing up under our modern civilization, has been held unconstitutional by some inferior federal court. It was because of this unwarranted usurpation of power that action was taken by the National Association of Attorneys General looking toward congressional relief, and in response to this action congress passed an act forbidding the granting of an injunction against any state officer upon the ground of the unconstitutionality of a state statute unless three judges were sitting, one of whom must be an associate justice of the supreme court of the United States or a United States circuit judge. (Act of Congress, June 18, 1910, section 17.)

Section 266, 61st Congress, U. S. Statutes at Large, p. 1162;

Ex Parte Metropolitan Water Co., 220 U. S. 539.

The court therefore having erred in granting the temporary injunction, it is unnecessary to consider the constitutionality of the act in question upon its merits.

The state frankly admits that there is serious doubt as to the constitutionality of the act; however, since no act of a legislature should be stricken down as unconstitutional unless it is clearly so beyond all reasonable doubt, we contend that in any event the act was not so clearly unconstitutional as to warrant the court in striking it down as being in contravention of the fundamental law. Especially is this true on a hearing upon a temporary injunction. We, therefore, submit the following in support of the constitutionality of the act:

Part II.

It is the contention of the plaintiffs in error that the lower court erred in holding that the statute in question was unconstitutional, deciding that the statute was a bill of attainder, provided for the infliction of cruel and unusual punishment, and deprived persons of life, liberty or property without due process of law.

While there has been a great deal of discussion during the past few years in the newspapers and in legal, scientific and other periodicals concerning the subject of sterilization of criminals and defectives by vasectomy, the question of the constitutionality of statutes of this kind has not been passed upon by this court. The only reported decisions in which the matter has been judicially discussed are in the cases of:

State v. Feilen, 70 Wash., 65; 126 Pac. Rep. 75;

Smith v. Board of Examiners, 85 N. J. Law, 46; 88 Atl. Rep. 963.

The object of the performance of this operation is to prevent the procreation of criminals, defectives and other degenerates, and this is based upon the theory that criminality or weakness of mind is inheritable, and should be resorted to as a protection to society against the generation of moral degenerates and mental incompetents. If habitual criminality connotes inheritable degeneracy, as claimed by the most eminent, scientific and legal writers, vasectomy of habitual criminals should be upheld as a measure for the protection of society against the procreation of criminals and degenerates without regard to the aspect of punishment. In fact, the sterilization of criminals and degenerates by vasectomy is not a punishment at all inflicted upon the person subjected to the operation but is a measure resorted to for the protection of society.

The supreme court of the state of Washington, in the case of the *State v. Feilen*, 70 Wash., 65, 126 Pac. Rep. 75; 41 L. R. A. (N. S.) 418 in upholding the constitutionality of the statute of that state providing for the sterilization of criminals by means of vasectomy, says:

> "On the theory that modern scientific investigation shows that idiocy, insanity, imbecility and criminality are congenital and hereditary, the legislature of California (Stat. 1909, p. 1093, chap. 720), Connecticut (Pub. Laws 1909, chap. 209), Indiana (Laws 1907, chap. 215), Iowa (Laws 1911, chap. 129), New Jersey (Laws 1911, chap. 190), and perhaps other states, in the exercise of the police power, have enacted laws providing for the sterilization of idiots, insane, imbeciles and habitual criminals. In the enforcement of these statutes vasectomy seems to be a common operation. Dr. Clark Bell, in an article on hereditary criminality and the asexualization

of criminals, found at page 134, vol. 27, Medico-Legal Journal, quotes with approval the following language from an article contributed to Pearson's Magazine for November, 1909, by Warren W. Foster, senior judge of the court of general sessions of the peace of the county of New York:

"Vasectomy is known to the medical profession as 'an office operation,' painlessly performed in a few minutes, under an anesthetic (cocaine), through a skin cut half an inch long, and entailing no wound infection, no confinement to bed. 'It is less serious than the extraction of a tooth,' to quote from Dr. William D. Belfield, of Chicago, one of the pioneers in the movement for the sterilization of criminals by vasectomy, an opinion that finds ample corroboration among practitioners. * * * There appears to a wonderful unanimity of favoring opinion as to the advisability of the sterilization of criminals and the prevention of their further propagation. The Journal of the American Medical Association recommends it, as does the Chicago Physicians' Club, the Southern District Medical Society, and the Chicago Society of Social Hygiene. The Chicago Evening Post, speaking of the Indiana law, says that it is one of the most important reforms before the people, that 'rarely has a big thing come with so little fanfare of trumpets.' The Chicago Tribune says that 'the sterilization of defective and habitual criminals is a measure of social economy.' The sterilization of convicts by vasectomy was actually performed for the first time in this country, so far as is known, in October, 1899, by Dr. H. C. Sharp, of Indianapolis, then physician to the Indiana State Reformatory, at Jeffersonville, though the value of the operation for healing purposes had long been known. He continued to perform this operation with the consent of the convict (not by legislative authority) for some years. Influential physicians heard of his work, and were so favorably impressed with it that they indorsed the movement, which resulted in the passage of the law now upon the Indiana statute books. Dr. Sharp has this to say of this method of relief to society: 'Vasectomy consists of ligating and resecting a small portion of the *vas deferens*. This operation is, indeed, very simple and easy to perform; I do it without administering an anesthetic, either general or local. It requires about three minutes' time to perform the operation, and the subject returns to his work immediately,

suffers no inconvenience, and is in no way impaired for his pursuit of life, liberty and happiness, but is effectively sterilized.' "

It is apparent from the reading of the foregoing opinion upon the constitutionality of the Washington statute that the sterilization of criminals by means of vasectomy is not a cruel punishment under our constitutional restriction, but is a measure for the protection of society and, is in fact, no punishment at all. The constitutional inhibition against cruel and unusual punishments has reference to those ancient, horrible, inhuman and barbarous inflictions and punishments like the whipping post, the pillory, burning at the stake, breaking on the wheel, quartering the culprit, cutting off the nose, ears or limbs, or strangling the victim to death, and not to statutes enacted in these advanced days of civilization providing for the sterilization of habitual criminals and defectives by the painless operation of vasectomy in order to protect society against the procreation of criminals and degenerates.

It is difficult to define with precision just what is meant, in a constitutional sense, by the words "cruel and unusual punishment." On this subject we respectfully call the court's attention to the following authorities:

O'Neill v. Vermont, 144 U. S., 323;

In Re. [illegible]a, 11 Cal. App. 575; 105 Pac. 779;

Cooley [illegible]Lim. 7th ed. pp. 471 et seq.;

Stat[illegible]y, 15 Cal. 429;

W[illegible]e, 47 Ga. 297;

S[illegible]v. Williams, 77 Mo. 310;

Alaridge v. Com. 4 Va. Cas. 447;

Wyatt's Case, 6 Rand. (Va.) 694;

In Re. Kemmler, 136 U. S. 436, 444, 34 L. ed. 519, 523, 10 Sup. Ct. Rep. 930;

Wilkerson v. Utah, 99 U. S. 130, 135, 25 L. ed. 345, 347;

Cooley, Const. Lim. 4th ed. 408;

Wharton, Crim. Law, 7th ed. sec. 3405;

Hobbs v. State, 133 Ind. 404; 18 L. R. A. 774; 32 N. E. 1019;

Weems v. United States, 217 U. S. 349, 54 L. ed. 450, 12 Sup. Ct. Rep. 693.

The trial court in deciding this cause on the application of the defendant in error (the complainant) for a temporary injunction held that the statute in question was a bill of attainder. In this the court was in error. A bill of attainder is a legislative act which inflicts punishment on a person without a judicial trial.

Cummings v. State of Missouri, 71 U. S. 277 at 323.

Can it be said that the painless operation of vasectomy, which is approved by the most eminent, scientific and legal writers, is a punishment? It is, indeed, no punishment at all. It is simply a means resorted to, in the case of habitual criminals, idiots, lunatics and other defectives, as a measure for the protection of society against the procreation of moral delinquents and mental incompetents.

If then the statute in question is not properly considered punitive in its nature, but wholly in the interest of society, the defendant has not been deprived of any of his fundamental rights without due process of law. If the plaintiff in error considers the statute mischievous in its tendencies, the answer is made by this court in the case of *Atkins v. Kansas*, 191 U. S. 223, wherein the court said:

> "So, also, if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives."

We submit that even on a permanent hearing the court would not be warranted in granting an injunction, but in view of the official opinion of the attorney general, the sworn statement of the warden and prison physician, and the official action of the board of parole, no reasonable ground whatever existed for the granting of the temporary injunction.

It was this very abuse in the granting of temporary injunctions which necessitated congressional action. It is significant to note that whereas it requires three judges to sit

in considering the granting of a temporary injunction, two of whom must concur, one judge alone may hear the case upon its merits and grant a permanent injunction.

Seaboard Air Line Ry. v. R. R. Com. of Ga., 213 Fed., 27 at 29.

In that case the court said: "There is no requirement in the Judicial Code, section 266, that three judges should hear the case when submitted for final decree on the pleadings and evidence. The three judges are only required to pass on the question of granting the interlocutory injunction."

The decision of the lower court should be reversed, the order granting the temporary injunction should be annulled and the temporary injunction dissolved.

Respectfully submitted,

GEORGE COSSON, *Attorney General of Iowa,*
For Plaintiffs in Error.

ROSS R. MOWRY,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

NO. 47.

WILLIAM H. BERRY, JOHN E. HOWE, AND D. C. MOTT, constituting the Board of Parole of Iowa, et al.,
Plaintiffs in Error,

VS.

RUDOLPH DAVIS,
Defendant in Error.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

GEORGE COSSON,
ATTORNEY GENERAL OF IOWA,
For Plaintiffs in Error.

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STATEMENT OF THE CASE.

On the 4th day of December, 1916, this court made an order directing attention to the fact that chapter 19-B, Supplement to the Code, 1913, section 2600-p, *et seq.*, was repealed and re-enacted. See chapter 19-B, Supple-

mental Supplement, 1915, 2600-s1 to 2600-s5, inclusive, page 238 of said Supplemental Supplement to the Iowa Code, 1915, and gave permission to the state to point out why the case in question should not be dismissed because of the repeal and re-enactment of the said act.

Speaking broadly and generally, the state is protesting and appealing against the wrongful granting of a temporary injunction, and the state's rights in this particular are not different because the statute has been repealed and re-enacted than though it had remained in precisely the same language as when the cause was heard and when the appeal was taken.

It should be kept clearly in mind that the state is not asking this court to pass upon the constitutionality of the statute in question which has been repealed and re-enacted. If it were so, to that extent the case would be a moot case; rather, the state is coming before this court insisting that inferior federal courts shall not indulge in moot and academic questions by passing upon the constitutionality of statutes when every right of complainants may be protected without passing upon the constitutionality of the law. Therefore the purpose of the appeal is first, to obtain relief from the wrongful granting of a temporary injunction; second, to re-establish the principle that state statutes are not to be stricken down as unconstitutional when complainant's rights may be fully protected without passing upon the constitutionality of the act; and third, for the purpose of overruling an erroneous decision which, if it stands without reversal, may create untold mischief.

See *Davis v. Berry*, 216 Fed., 413.

ARGUMENT.

The state contends that this case is governed by the doctrine announced in *Southern Pacific Terminal Company v. Interstate Commerce Commission and Young*, 219 U. S., 498; and that of *United States v. Trans-Missouri Freight Association*, 166 U. S., 290 at 308, and cases therein cited and *Boise City In. Co. v. Clarke*, 131 Fed., 415, rather than *Richardson v. McChesney*, 218 U. S., 487, and *Jones v. Montague*, 194 U. S., 147.

There is nothing better settled in the entire jurisprudence of this country than that a person is not entitled to ask that a court shall strike down as unconstitutional a statute, unless it is shown that he himself will be injured by the unconstitutional law. It is not only the doctrine of every state in the Union and every text writer, but the doctrine of this court.

This court in the case of *Hooker v. Burr*, 194 U. S., 415, speaking through Mr. Justice Peckham, page 419, announced the doctrine as follows:

> "We have lately held (therein following a long line of authorities) that a party insisting upon the invalidity of a statute, as violating any constitutional provision, must show that he may be injured by the unconstitutional law before the courts will listen to his complaint. *Tyler v. Judges, etc.*, 179 U. S., 405; *Turpin v. Lemon*, 187 U. S., 51, 60. If, instead of showing any injury, the plaintiff shows that he cannot possibly be injured, he cannot of course ask the interference of the court."

And this court said in the comparatively recent case of *McCabe v. A., T. & S. F. Ry. Co.*, 235 U. S., 151, that before an injunction would be granted, the complainant must show a personal need and an absence of adequate remedy at law, and "the fact that some one else, although of the same class as complainant, may be injured, does not justify granting the remedy."

And in that case it was held that colored men were not entitled to have the statute of Oklahoma held unconstitutional in the absence of a showing that they personally had been discriminated against because of the certainty that some other colored man would be discriminated against if the statute was permitted to remain as a valid act of the legislature of Oklahoma. The court, on page 164, said:

> "The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks."

It is further a cardinal principle of constitutional law that a court will not pass upon a constitutional question if the case can be otherwise decided.

In the case of *Light v. United States*, 220 U. S., 523, this principle is again affirmed and announced, the court refusing to pass upon the constitutional questions involved because unnecessary, and citing *Siler v. Louisville & Nashville R. R.*, 213 U. S., 175.

We then have this situation: complainants in the court below filed a bill asking for certain relief. Defendants

granted the relief *in toto* and made it absolutely certain that no possible injury would result to them. This being true, complainants' bill should have been dismissed and the court should have declined to have passed upon the constitutionality of the act. When the court, however, proceeded in spite of this fact to file an opinion upon the constitutionality of the act, they entered into an academic discussion which was not necessary in order to protect any rights of the complainants. The decision then of the inferior federal court became both academic and moot, and it is this very decision which the state is protesting against in this court. Instead of this appeal being dismissed as moot, the bill of the complainants should be dismissed as moot with costs. If the appeal is dismissed, then the erroneous decision, carelessly written, containing misstatements as to the record and fundamental errors of law, will stand as a precedent. For this reason a public question is involved and a public interest attaches to the decision in question.

We desire to repeat what we said in the main argument, not by way of criticism, but as a conservative statement of the fact that almost every law looking toward social or moral reform, which has been passed by the several states in the Union in the last decade, has been held unconstitutional by some inferior federal or state court. This abuse by the federal courts, and the other inferior courts, had a far reaching effect upon the thought of this country. This protest was manifest in several ways. The recall of the judiciary was demanded,—indeed, not only demanded but incorporated in the constitutions of at least six of the states of the Union.

See Constitution of Oregon, Art. 2, sec. 18;
Constitution of California, Art. 23;
Constitution of Colorado, Art. 21, and amendments to Art. 6, sec. 1;
Constitution of Arizona, Art. 8, sec. 1;
Constitution of Nevada, Art. 2, sec. 9;
Constitution of Kansas, Art. 4, secs. 3, 4 and 5.

Ohio, however, and I think some other states incorporated into their constitutions a much more practical remedy. Article 4 of the constitution of Ohio requires the concurrence of all but one of the seven judges of the supreme court of that state in order to hold a law of the state unconstitutional, except in affirming a judgment of the court of appeals holding a law invalid.

The National Association of Attorneys General started an agitation which resulted in the act of congress which prohibited one United States judge from granting a temporary injunction upon the ground of the unconstitutionality of a state statute, and required that before such an injunction should issue, there must be three judges sitting, two of whom must concur and one of such judges must be an associate justice of the supreme court of the United States or a United States circuit judge. Acts of Congress, June 18, 1910, section 17. Section 266, 61st Congress, U. S. Statutes at Large, page 1162; *Ex Parte Metropolitan Water Co.*, 220 U. S., 539.

It is perfectly elementary that an appeal may be had from the wrongful granting of a temporary injunction. It was the abuse of wrongfully granting temporary injunctions which congress sought to correct. It is this

abuse incorporated in the form of an opinion entitled *Davis v. Berry* and recorded in 216 Fed., pages 413-419 inclusive, which the state is insisting should be overruled so that it will not stand as a sign board pointing in a wrong direction to other judges of the United States and to state courts.

The case ceased to have any personal consideration from the very moment that the state offered to give the complainants in the court below full relief, but the state is vitally concerned with these two fundamental propositions: the constitutionality of an act should not be passed upon by either a federal or a state court unless the rights of the parties to the suit make it imperative.

Light v. United States, 220 U. S., 523 at 538;

Siler v. Louisville & Nashville R. R., 213 U. S., 175;

Cyc. on Constitutional Law, Vol. 8, p. 98, Par. 3-b.

And no injunction shall be granted on the complaint of any one unless he himself will suffer injury.

McCabe v. A., T. & S. F. Ry. Co., 235 U. S., 151.

To dismiss the appeal would be to encourage inferior courts to go beyond the necessities of the case and render academic and moot decisions on constitutional questions. To sustain the appeal and dismiss complainants' original bill, or overrule the decision of the inferior court, will be in harmony with the jurisprudence of this and every civilized country of the world, and will be to discourage academic and moot discussions of constitutional law and place a check upon the abuse of power of inferior courts

in exceeding the necessities of the case. It will likewise be in exact harmony with the act of congress previously referred to.

Let me again state that this is not a case where the state is asking this court to pass upon the constitutionality of a statute which has been repealed, but the state is asking that the decision recorded in the Federal Reporter wrongfully granting a temporary injunction should be overruled and the doctrine re-affirmed that no injunction shall be granted to a complainant, much less a temporary injunction, unless he shows that he himself will suffer injury in the absence of the granting of such an injunction, and that the constitutionality of an act shall not be passed upon unless the rights of the parties to the suit make it imperative.

We respectfully submit that the state's appeal should be sustained and that complainants' original bill should be dismissed with costs.

GEORGE COSSON,
ATTORNEY GENERAL OF IOWA,
For the Plaintiffs in Error.